(25,321)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 499.

GENERAL RAILWAY SIGNAL COMPANY, PLAINTIFF IN ERROR,

vs.

COMMONWEALTH OF VIRGINIA AT THE RELATION OF THE STATE CORPORATION COMMISSION.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

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1 In the Supreme Court of Appeals of Virginia, at Richmond.

GENERAL RAILWAY SIGNAL COMPANY
v.
COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION.

To the Honorable Judges of the Supreme Court of Appeals of the State of Virginia:

The petition of General Railway Signal Company respectfully represents unto your Honors that it is aggrieved by an order entered on the 17th day of December, 1914, by the State Corporation Commission in a certain matter before it, wherein the Commonwealth of Virginia at the relation of the State Corporation Commission was complainant and your petitioner was defendant.

Your petitioner presents herewith a transcript of the record of said proceedings, from which it appears that the State Corporation Commission awarded a rule against your petitioner, dated August 24, 1914, and returnable at the court room of the State Corporation Commission at the Capitol Building in the City of Richmond, Virginia, on September 16, 1914, requiring it to show cause why it should not be fined under section 1105 of the Code of Virginia, as amended, for transacting business in said State without first obtaining the certificate of authority provided for in section 1104 of the Code of Virginia, as amended; that upon the return day your petitioner filed its answer to the charge that it had violated and was violating the statutes of Virginia; that on October 6, 1914, a hearing was had before the State Corporation Commission at Richmond, at which evidence was introduced on behalf of the Commonwealth of Virginia and of your petitioner; and that on December

2 17, 1914, the State Corporation Commission rendered its decision in favor of the complainant and against your petitioner.

Your petitioner respectfully represents that the action of the State Corporation Commission was erroneous for reasons which are set out in its answer and which may be briefly stated as follows:

I. Your petitioner is a stock corporation of the State of New York engaged therein in the manufacture and interstate sale of railway signals, and in the conduct of its interstate business has from time to time entered into contracts with the Southern Railway Company for the sale to it of railway signals and their installation on the lines of the Southern Railway Company in Virginia and other States.

II. Your petitioner has entered the State of Virginia solely for the purposes of its interstate commerce, and has never done and is not now doing business in the State of Virginia within the meaning of the statutes of Virginia relating to foreign corporations.

III. Assuming that the statutes of Virginia relating to foreign corporations be construed to apply to any acts of your petitioner,

on the ground that they constitute intrastate commerce or on any other ground, such statutes are repugnant to the Constitution of the United States, and in particular to section 8 of Article I thereof, and to the Fifth Amendment and to section 1 of the Fourteenth Amendment thereto, and are therefore invalid.

Wherefore your petitioner prays that an appeal be granted to it from the order complained of, together with a supersedeas thereto; that the judgment of the State Corporation Commission may be reversed; and that such order may be entered by this court as may be right and just.

And your petitioner will ever pray.

GENERAL RAILWAY SIGNAL COMPANY,
By Its Attorneys, McGUIRE & WOOD, AND
WELLFORD & TAYLOR.

January 28, 1915.

I, Joseph C. Taylor, an attorney practicing in the Supreme Court of Appeals of Virginia, certify that, in my opinion, the decision and order of the State Corporation Commission of Virginia rendered on the 17th day of December, 1914, referred to in the foregoing petition for appeal and shown in and by the record accompanying the same, should be reviewed by the said Court.

Respectfully, JOSEPH C. TAYLOR.

3 Appeal allowed, bond $100.00, with surety as may be required by the State Corporation Commission, and said appeal will operate as a supersedeas also when the appellant or some one for it shall have executed a bond in such additional amount to that above named and with such surety as may be required by the State Corporation Commission.

JAMES KEITH.

January 29, 1915.

VIRGINIA:

Proceedings Before the State Corporation Commission, in the City of Richmond, the Seventeenth Day of December, 1914.

COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION
v.
GENERAL RAILWAY SIGNAL COMPANY.

(*Rule.*)

Be it remembered that heretofore to-wit, on the twenty-fourth day of August, 1914, a rule was awarded by the State Corporation Commission against the General Railway Signal Company in the words and figures following:

"A rule is hereby awarded against General Railway Signal Company, a corporation chartered under the laws of some other jurisdiction than of the Commonwealth of Virginia, and designated as a foreign corporation, returnable at the Court Room of the State Corporation Commission, in the Capitol Building in the City of Richmond, Virginia, at ten o'clock A. M., on Wednesday, the sixtennth da yof September, 1914, requiring it to show cause, if any it can, why it should not be fined under Section 1105 of the Code of Virginia, as amended, for transacting business in this State without first obtaining the certificate of authority provided for in Section 1104 of the Code of Virginia, as amended,"

and thereupon certain proceedings were had as hereinafter set forth:

4 COMMONWEALTH OF VIRGINIA:

Department of the State Corporation Commission.

Judicial Case No. 420.

CITY OF RICHMOND, September 16th, 1914.

COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION
v.
GENERAL RAILWAY SIGNAL COMPANY.

(*Rule.*)

Rule under Section- 1104 and 1105 of the Code.

This day came the defendant, General Railway Signal Company, and filed its answer to the rule.

Answer.

COMMONWEALTH OF VIRGINIA,
State Corporation Commission:

COMMONWEALTH OF VIRGINIA, Complainant,
v.
GENERAL RAILWAY SIGNAL COMPANY, Defendant.

A rule having been awarded against General Railway Signal Company, a corporation organized under the laws of the State of New York, dated August 24, 1914, and returnable at the court room of the State Corporation Commission in the capitol building in the City of Richmond, Virginia, on September 16, 1914, requiring it to show cause, if any it can, why it should not be fined under section 1105 of the Code of Virginia, as amended, for transacting business in said State without first obtaining the certificate of authority provided for in section 1104 of the Code of Virginia, as amended, and

a summons having thereupon been issued returnable at the same time and place and having been served upon said General Railway Signal Company, said corporation hereby answers the charge that it has violated and is violating the statutes of Virginia as follows:

First. It alleges that it is a stock corporation duly organized and existing under and by virtue of the laws of the State of New York, having its office and principal place of business in the Town of Gates, County of Monroe, State aforesaid, where it owns and operates a large manufacturing plant devoted to the manufacture of railway signals; that its sole business is the manufacture and sale of such signals and the apparatus incident and necessary to the operation thereof; that it has at no time had or maintained an office in the State of Virginia; that it heretofore entered into a contract with the Southern Railway Company for the sale to it of railway signals to be operated on certain of its lines in Virginia, North Carolina, South Carolina and Georgia; that said contract was made outside the State of Virginia; that the Southern Railway Company is an interstate railroad and its lines covered by said contract are interstate lines; that pursuant to the terms of said contract the defendant manufactured and delivered on the lines of said Southern Railway Company and has installed and is still engaged in installing said railway signals in Virginia, North Carolina, South Carolina and Georgia; that such installation has been and is conducted under the supervision of expert engineers and other trained employees of the defendant sent from its office in the State of New York; that such installation was and is necessary to effectuate said contract entered into by the defendant and the transaction contemplated thereby, namely, the sale to the Southern Railway Company of railway signals and a system thereof, because of the peculiar qualities and inherent complexity of the railway signals manufactured by the defendant; that the railway signals manufactured and sold by the defendant are valueless and useless until and unless installed and made operative by and under the supervision of trained employees of the defendant, no other persons possessing the requisite knowledge of the methods of the defendant; and that from the nature of the railway signals manufactured by the defendant they cannot be sold as finished and complete unless and until installed.

Second. It denies upon information and belief that the acts, or any of them, performed by it in the State of Virginia or elsewhere constitute doing or transacting business in the State of Virginia.

Third. It alleges upon information and belief that the statutes of Virginia relating to foreign corporations do not apply to any of the acts of the defendant; but that if so construed or intended, they are to such extent in contravention of section 8 of article I of the Constitution of the United States and therefore null and void.

Wherefore the defendant prays an order denying the relief asked in the rule to show cause and judgment dismissing the charge against it.

McGUIRE & WOOD,
Attorneys for the Defendant.

910 German Insurance Bldg., Rochester, New York.

6 STATE OF NEW YORK,
County of Monroe, City of Rochester, ss:

John F. Braam, being duly sworn, deposes and says that he resides in the City of Rochester, Monroe County, New York, and is the assistant treasurer of the General Railway Signal Company, the defendant above named; that he has read the foregoing answer and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

JOHN F. BRAAM.

Subscribed and sworn to before me this 14th day of September, 1914.

J. SAWYER FITCH,
Notary Public.

COMMONWEALTH OF VIRGINIA:

Department of the State Corporation Commission.

Judicial Case No. 420.

CITY OF RICHMOND, October 6th, 1914.

COMMONWEALTH OF VIRGINIA, at the Relation of the State Corporation Commission,
v.
GENERAL RAILWAY SIGNAL COMPANY.

Rule.

Rule under Section 1105 of the Code.

This day came the Commonwealth by the Attorney General, and the defendant by its attorney, and the evidence having been fully submitted the Commission takes time to consider of its judgment and the order to be entered herein.

Evidence.

Case No. 420.

COMMONWEALTH OF VIRGINIA, at the Relation of the State Corporation Commission,

v.

GENERAL RAILWAY SIGNAL COMPANY.

7 Failure to Secure Certificate of Authority as provided in Section 1104 f the Code of Virginia.

Court Room of the State Corporation Commission, Capitol Building, Richmond, Va., October 6th, 1914.

Present: R. R. Prentis, Chairman; Wm. F. Rhea, Commissioner. John Garland Pollard, Attorney General of the State of Virginia, for Plaintiff; H. Satterlee, for Defendant.

F. W. MOFFETT, a witness introduced on behalf of the Defendant, being duly sworn, testified as follows:

By Mr. Satterlee:

Q. Mr. Moffett, what is your full name?
A. Frank Wesley Moffett.
Q. You are connected with the General Railway Signal Company?
A. Yes, sir.
Q. What is your position?
A. Assistant Sales Manager.
Q. How long have you been connected with the Company?
A. Since 1904 or '5.
Q. The General Railway Signal Company is a corporation of the State of New York?
A. Yes, sir.
Q. What is its business?
A. The manufacture and sale of railway signals.
Q. Where does it sell its railways signals?
A. To railways almost exclusively; in some instances to other signal companies; in the case of foreign business we sometimes sell to other signal companies.
Q. Does it sell only in the State of New York, or outside of the State of New York?
A. No, it sells all over the world.
Q. When it sells its signals does it always also agree to install them, to put them up, or sometimes does it not?
A. It sometimes does not.
Q. Will you explain the occasion for this difference?
A. Well, if the railway company, purchasing has an organized signal construction department that is familiar with the installation

of the particular type of system then it is usually installed by the railway company; otherwise it is usually installed by the signal companies.

8 Q. Can ordinary electricians or electrical engineers safely instal a modern signalling system, such as you manufacture?

A. Not unless they have had particular training with the system furnished.

Q. By such training do you mean with signal companies or the particular department of signals?

A. It might be either with a signal company or with a railway company that had an organization familiar with that work.

Q. What would you say as to the nature of your so-called alternating current automatic signal?

A. That is a quite recent development of the art of signaling; in fact, is the one that is attracting more attention than any other at present, and there are very few railroads that are familiar with that system.

Q. Is it simple or complicated?

A. It is considered at present very complicated; it is the most complicated of all signal systems.

Q. The railway signals which you speak of as being manufactured and sold by the General Railway Signal Company, or signals which are generally seen by the travelers on railroads—how would you describe them?

A. The part the traveller would see would be the present standard of iron post, with an arm operating through 90 per cent., usually in the upper quadrinth; that is visible to the passenger who may happen to be on the rear of a train. The working of it is not visible to the passenger, except so far as the movement of the arm of the signal is automatic. It is worked entirely by the train affecting currents of electricity, which are passing through the rails.

Q. What is the general purpose of this signaling system, as well as other signaling systems?

A. There are two which might be called chief purposes. Perhaps foremost is the greater safety of railway operation that is afforded by the use of an automatic signaling system. It is considered and recognized generally that an automatic signaling system affords the greatest known protection to railway traffic. Indiana, for instance, has compulsory legislation, as do some other States. The other purpose is the greater facility it gives to the operation of railway trains.

Q. Then it is true, is it not, that a signaling system which works improperly, either from inherent defects or from improper installation, would be dangerous to life?

A. It would not only be dangerous, but worse.

By Commissioner Rhea: What is the object of this line of questions?

9 Counsel for Def't: Our contention is that the installation of this signal system is so necessarily connected with the sale of it that it is a mere incident of the sale.

Q. Will you just note briefly some recent installations that you have made of this particular kind of signaling system, the automatic alternating current?

A. The last order that we took for a system of this kind was on the Interborough Rapid Transit for New York City, for the subways, known as Chatham Square.

Q. Was that for your own installation?

A. No, that work was installed by the railway company, as far as I know, they have for years been doing their own work.

Q. They have a signaling organization of their own?

A. Yes, they have signaling engineers, and are themselves interested in the matter of developing such systems. The previous alternating current contract was with the Grand Trunk Railway for about 20 miles of track at Chicago.

Q. Did you instal that?

A. We contracted to instal that.

Q. Has the Grand Trunk Railway a signaling organization?

A. It has one, but is not equipped to instal systems of this kind.

Q. Just mention two or three more contracts?

A. The one before that was at Melbourne, on the Railway of Australia. That installation was sold to the British Pneumatic Company of London, and I can't tell you whether they will install it, or the railway.

Q. Mention another?

A. At Fort Wayne, Indiana, between Diamond and Spring. We will install that ourselves.

Q. Where are the principal offices of the General Railway Signal Company?

A. The principal office and factory is at Rochester, New York. We have a branch factory at Montreal, Canada, and have branch offices at New York City, Chicago and San Francisco.

Q. Your manufacturing is done, however, usually at Rochester?

A. Yes, sir.

Q. Have you any office in the State of Virginia?

A. No, sir.

Q. Have you ever had any office in the State of Virginia?

A. Not to my knowledge.

Q. Last Spring did your Company enter into negotiations with the Southern Railway with reference to selling it railway signals?

A. Yes, we took up with them the proposition looking towards supplying to them such systems as they might purchase, and we made a proposition that we would furnish them a system almost identical, except giving them the advantage of later improvements, to the system we have been furnishing the last year or two.

Q. You had sold them signals for use between Knoxville and Morristown, Tennessee, for example?

A. That was a contract we had taken about the time we had negotiations for several other contracts with them this year.

Q. I show you copies of correspondence between the purchasing Agent of the Southern Railway Company and the Manager of your

New York branch, and ask if these are the copies of the actual correspondence that took place between your Company and the Southern Railway Company?

A. That is a copy of the correspondence.

By Mr. Satterlee: I will explain to the Attorney General that these are file copies of the letters that were written by the Signal Company and of the letters received from the Purchasing Agent of the Southern Railway Company.

By Mr. Pollard: We accept them, subject to verification should we desire.

By Mr. Satterlee: I offer these letters, to be filed as "Moffett—Exhibit No. 1."

The Chairman: Is that the entire correspondence with reference to these transactions?

Mr. Satterlee: That is the entire correspondence leading up to the contract, which I will offer later. This correspondence refers to two or three divisions of the Southern Railway as to which contracts were entered into at the same time—one between Amherst and Whittles in Virginia and another in the State of Georgia.

By Mr. Satterlee:

Q. Mr. Moffett, as a result of that correspondence which has been introduced in evidence were contracts subsequently executed between the Gen-ral Railway Signal Company and the Southern Railway Company for the sale of signals to the Southern Railway Company for installation on its lines, partly in Virginia and partly in Georgia?

A. Yes.

Q. Is this the original contract that was entered into with reference to the Virginia installation?

A. Yes, this is the Signal Company's copy.

Q. It is a duplicate original?

A. Yes, it bears the signature of the Railway Company's officers and our officers.

11 Q. Were contracts similar to this, except as to the signals to be supplied and the price entered into in other States?

A. The contract is identical except the places between which they are to be installed and the price with contracts that have been executed covering the other sections.

Q. In Georgia?

A. Yes.

By Mr. Satterlee: I offer this contract in evidence (marked Exhibit No. 2).

By Mr. Pollard:

Q. I would like to ask the witness a question at this point, if you will allow me. Is this the contract under which the work was done between Alexandria and Orange?

A. I don't know the contract by that particular name.

Q. Your Company put in a signal system on the Southern road between the city of Alexandria and the town of Orange, which

is the terminus of the Chesapeake and Ohio, and that is the work in which we are interested.

The Chairman: We are interested in all the work in Virginia.

Mr. Satterlee:

Q. This is the contract under which they are at present installing systems in the State of Virginia?

A. Yes, we entered into a contract the 8th of July, 1913, according to my recollection, between Orange and Seminary, and it is practically identical with this Amherst-Whittles work.

The Chairman:

Q. That is, that you were to install the system?

A. Yes.

Q. You installed it between Seminary and Orange and are under contract to install it between Amherst and some other point in Virginia?

A. Yes.

By Mr. Pollard: Have you the contract for the work between Seminary and Orange?

By Mr. Satterlee: We have not that, because that work is already done.

By Commissioner Rhea: Do I understand that this contract is similar to all other contracts for work you are doing and have done in Virginia?

12 By Mr. Satterlee: Yes, it is identical to that previously entered into for the work between Seminary and Orange.

By Mr. Pollard: I should think it will be necessary to furnish us the various contracts under which work was done in Virginia.

By Mr. Satterlee: We will be glad to do that. I did not bring them, because I did not know the question would be raised.

By Commissioner Rhea:

Q. How many contracts have you in Virginia with the Southern Railway?

Witness: Only one with the Southern and none with any other road. I don't think we have any with any other road; we are selling some material.

The Chairman: We are interested with this proceeding with regard to the installation of this signal work in Virginia. It is the duty of the Commission to inquire into all the work that you have done in Virginia—have there been any cases of installation of your work by your Company within any reasonable time, say three years?

A. I don't know that I have here such information as would enable me to answer.

By Mr. Satterlee:

Q. If you know in a general way, tell the Commission?

A. We have had some small contracts with the Southern prior to these contracts mentioned. I don't recall whether in Virginia or elsewhere on the Southern and my report would not show.

By the Chairman: Will you furnish a memorandum of your work installed in Virginia on the Southern Railway, or any other road in Virginia, or any work in the last three years.

By Mr. Satterlee:

Q. What is the total contract price in the present contract?
A. $85,597.
Q. In fixing that price what proportion of it do you assign to cover the expense of the installation?
A. That would be between 8 and 10 per cent., I can't say positively.
Q. Somewhere between 8 and 10 per cent. of the total contract price?
A. Yes.
Q. The Southern Railway runs through what States?
A. Virginia and North Carolina and South Carolina, Tennessee, Alabama.
Q. Georgia?
13 A. Yes, Georgia.
Q. The installation which you are now conducting on the line between Amherst and Whittles, is it on a through line, or on a branch line of the Southern Railway?
A. I believe that is the through line between Amherst and Whittles.
Q. Will you describe how you conduct such an installation as that covered by the present contract?
A. Well, after we receive notice of award, the specifications and information as to the terms of the contract, those relating to specifications are turned over to our engineering department. The engineers instruct as to the details of the specifications to be followed in the manufacture of the installation and if to be installed they also instruct as to the detailed specifications to govern the installation. After that information is given to what we term our commercial department, it is put into commercial language for the factories and the factory manufactures the necessary devices. It is then shipped out and a foreman, with the necessary experienced men, is sent from various points of the country to make the installation, the foreman being instructed to employ such labor locally as may be required to assist the experienced men.
Q. In the case of the present installation, will you tell us about how many men are employed, and about how many are experienced men in your employ, technically trained men, trained in the service of the General Railway Signal Company, and how many are laborers?
A. Do you mean that as to totals, or how?
Q. First as to totals?
A. Our installation clerk gave me a statement as of the 18th of September. At that time we were employing 11 experienced men and 9 laborers on the Amherst-Whittles installation.
Q. When you say experienced men what do you mean by that?
A. Well, the General Foreman, Mr. Lowenthal, had, previous to

undertaking this work, had been engaged in the installation of a somewhat similar system on the New York State railways.

Q. I don't mean to go into details, but do you mean men that have been in your employ and have been experienced in doing such work as this for the Signal Company?

A. Yes, we have never been able to get the work done, except we train the men for it. We take men out of college; try to get them during vacation, boys that have to work their way through college. If they work through the vacations, we find when they come out of college they make very valuable men.

Q. Some of those men that you have spoken of, those assistants, are college and technical school graduates, are they not?

14 A. Yes, I can't tell you just the proportion, but we usually have several on each installation.

Q. And the unskilled labor that you speak of, are men employed along the line, or anywhere, who simply assist the experienced men?

A. Yes.

Q. Has or has had the Southern Railway Company any trained signal organization, such as you have spoken of as necessary in the installation of a signal system?

A. Never to my knowledge. The Southern Railway Company has a signal organization; but they do not have, and have not undertaken to organize a construction department, so far as I know.

By Commissioner Rhea:

Q. As I understand you testify that these contracts were made usually in the State of New York?

By Mr. Satterlee: Yes, sir, this one in particular, I am sure.

By Commissioner Rhea: And for that reason you claim you are not under the statute in this case?

By Mr. Satterlee: If it please the Court, we claim that we are not doing business in Virginia, for several reasons, one incidental reason is the contracts were not made in the State of Virginia, but the principal reason, or one of the principal reasons is that the General Railway Signal Company is a corporation which is engaged in the manufacture and interstate sale of its products.

By Commissioner Rhea: Don't you furnish the material and labor and everything necessary to put this system in operation on the Southern Railway?

Witness: In cases where railways have organizations of their own that are competent after the signals are received to install them, the General Railway Signal Company stops there; but in some cases the railways have no organization of their own and we have to install them.

By Commissioner Rhea: In this particular case?

Witness: In this case the Southern Railway Company had no organization competent to install their signals and, therefore, in order to effect the sale the General Signal Company had to agree to install them themselves.

By Mr. Satterlee:

Q. Does the General Railway Signal Company, Mr. Moffett, make its profit chiefly on the sale of its signals, or on its installation?

A. On the sale of its signals.

Q. In its negotiation with the General Railway Signal Company did the Southern Railway Company ask for and insist — the installation of the signals?

15 A. We have heretofore installed all of the apparatus of the kind in question when furnished to the Southern Railway, and I don't recall that that point was brough out. It was understood by us that the Southern Railway would require whoever secured this contract to instal it.

By Commissioner Rhea: Your idea was that the Southern Railway Company would require the General Railway Signal Company to install this apparatus if it purchased it?

A. Yes, sir.

By Mr. Satterlee:

Q. Mr. Moffett, were other companies bidding and competing for this particular business?

A. I don't know that they were for this particular business, because we have done work practically identical with this, and we suggested to the Southern Railway the advisability of contracting at similar terms for this work—terms that were given on similar work to this which was competitive. I don't know whether they secured bids for this work or not.

Q. To your knowledge, was the present contract which has been offered in evidence executed within or without the State of Virginia?

A. If by executed you mean where it was signed last; does that constitute execution?

Q. Yes?

A. It was signed last at Rochester by our officers.

Q. Have you there, Mr. Moffett, the plans showing the character of the signals that are being installed under the present contract?

A. I have plans that are furnished to the general foreman for use in connection with the installation—I don't have detailed plans of the parts of the apparatus.

By Commissioner Rhea: Can't you just make those exhibits in the record without going into details?

By Mr. Satterlee: I simply offer these in evidence without going into the character of the work and ask that they be filed and marked "Moffett, Exhibits Nos. 3 and 4."

By Mr. Satterlee: I have here, if it please the court, a description of this particular kind of system, which has been prepared in the office of the Company, which I would like to offer in evidence, and ask that they be filed and marked "Moffett, Exhibits Nos. 5 and 6."

16 Cross-examination.

By Mr. Pollard:

Q. Mr. Moffett, can you tell the Commission when your Company first began the work of the installation of signals in Virginia?

A. I don't believe I can. We would be able to tell from an examination of our records at Rochester, but I could not say that offhand.

Q. Will you furnish the Commission with that information?

A. Yes, sir.

Q. So far as your knowledge goes when was the first work of installation done in Virginia?

A. We have done work, to my knowledge, back as far as 1911. It is possible; in fact, I imagine, probable that we have made installations in the State of Virginia for many years; but my information here does not show.

Q. To your personal knowledge, you know that your Company has made installation in Virginia as early as 1911?

A. Yes, sir.

Q. Have you drawings or cuts showing the installation so far as visible to the eye of the traveller?

A. Yes, this is it.

Q. How would you designate that cut, is it by number?

A. Southern Railway Plan S. D. 981, dated February 20th, 1911.

Q. That blue print shows the structure which holds the signal?

A. Yes, sir.

Q. Is that the structure, the character of the structure that you have been erecting in Virginia?

A. It is quite similar.

Q. Explain to the Commission the character of that construction, the material used, the size, heights, etc.?

A. The height from the level of the rail to the operating arm is generally about 22 or 23 feet, and at the arm with the apparatus we are installing is an alternating current induction motor with a train of gears connected with the arm and holding devices controlled from relays, which would be located in housings near or attached to the base of the pole. Those relays are connected with transformers located on short poles; the transformers are connected with the transmission line and the transmission line connected with a generating plant at some point along the Southern Railway, usually many miles distant.

Q. What other structures is it necessary for you to erect in connection with installing your signals?

A. It is necessary to erect the signal mechanism, the mast supporting the mechanism, the houses for protecting the relays, reactants and other small electrical devices protected from the
17 weather, then the transformers, high tension line arrester, low tension line arrester.

The Chairman:

Q. Do you go under the ground with your wire; do you have conduits under the ground?

A. To reach the rails we do have conduits under the ground.

By Mr. Pollard:

Q. Are there any structures other than the houses you refer to and the poles shown in the blue print—I am speaking of above the ground?

A. Would you mean the devices inside the structures?

Q. No, I am speaking of the structures which would be observed by the traveller?

A. The transformer would be observed by him.

Q. Where are the transformers?

A. The transformers are sometimes located on what we call a cable pole, sometimes that is iron, sometimes wood.

By Commissioner Rhea:

Q. What is a transformer?

A. A transformer is a device used for changing the voltage. In this case on the line is what we term a high voltage, and for the operation of the signal system it is necessary to step it down to lower voltage. We use 110 volts and 55 and lower voltage is down to one volt.

Q. Does it require experts from your factory or some other factory to install your system?

A. From our factory or some one familiar with the work.

Q. The Southern Railway, or no other railway, so far as you know has an expert competent to do this work?

A. The Southern Railway now has one of our employes in their employment. So far as I know that is the only man that has had that training.

By Mr. Pollard:

Q. Have you other blue prints showing the structures that have to be erected with the installation of your system—when I speak of structures, I am speaking, for the time being, of structures above ground that would be observed by the traveller?

A. Here is one.

Q. Look at the cut that I now show you, taken from your book entitled "Alternating Current Block Signals" and tell me whether the structures shown in the cut are similar structures to those you

18 have been erecting in Virginia; if so, please mark the picture and file it as "Moffett, Exhibit No. 7." I hand you also another picture of "Transformer for Signal Operation," figure No. 4, on page 13 of the same book, and I ask you whether that is the character of the construction you have been erecting in Virginia, and I will ask that this be filed and marked "Moffett, Exhibit No. 8."

By Mr. Satterlee:

Q. Mr. Moffett, the contract which is in evidence shows what your different duties are; shows what construction work is to be done by the Southern to make it ready for your installation?

A. It describes that; I don't know that it shows the pictures of it.

By Mr. Pollard:

Q. Will you likewise identify and file as a part of your evidence figures 22 and 23, taken from the same book, and tell the Commission whether these structures are of the same character as the structure you have erected or are erecting under your contract with the Southern Railway, and I ask that these be marked "Moffett, Exhibits Nos. 9 and 10." Are there any other structures which you have erected in Virginia in connection with the installation of your signals?

A. I don't think of any.

Q. Where does the material come from which these structures are erected?

A. The material as it is used comes chiefly from our factory; while, for instance, we don't actually draw or make the wire, we purchase that and use it in winding our instruments, and then we purchase other wire and use that in connecting the line wires, which are erected and furnished by the Southern Railway.

Q. What part of the material used in the installation of these signals is manufactured at your factory?

A. The signal masts or posts, the signals, the relays, transformers, reactants, impedences, the housings for the various devices; those are the principal things; there are innumerable small parts.

Q. What part of the material used for the installation of your signals is purchased in Virginia?

A. I don't recall that there is anything, except possibly we may run short of such a thing as a roll of tape. I don't know whether we are actually doing that down here, or not; we might purchase some if the crew was short of it and we could get it here.

19 Q. You have spoken of the structure above ground, what do you have to do under the ground to instal your system?

A. We put in a conduit for the wires. We call that trunking, by the way, instead of conduit.

Q. Do you have to dig trenches for that?

A. Yes, sir.

Q. Does that trench have to be dug parallel with the line of the railroad?

A. In some instances it does. The exhibit of the plans there, I believe, will give you a clear idea of that.

Q. Is the trench in which these wires are put—is that as long as the railroad itself?

A. No; if they use staggered joint it would run from one staggered joint to the other, a distance of perhaps not to exceed 20 feet.

Q. Could you give the Commission any idea as to the amount of trenching that would have to be done in installing a line, say 100 miles in length?

A. Well, just roughly, possibly 800 to 1,600 feet; that is rather rough.

Q. How deep is the trench dug?

A. To about the bottom of the ties.

Q. You have to buy wooden poles in installing your system, do you not?

A. No, the Southern Railway furnishes that part and puts it up
Q. They furnish the poles to you?
A. The wooden poles they furnish.
Q. How many laborers do you employ; under the contract in evidence, being the contract for installing the signal system between Amherst and Whittles in Virginia, how many laborers do you employ?
A. At the time I checked it up, we had at that time I believe nine.

By Commissioner Rhea:

Q. How many laborers and how many experienced signal men?
A. 9 laborers and 11 signal men, including the general foreman.

By the Chairman:

Q. Were all those sent from New York.
A. No, some came from Canada; that is, they were sent from installations we were making there, and from various places throughout the country.
Q. Were the laborers employed in Virginia?
A. Yes, sir.
Q. Were any of the signal men employed in Virginia?
20 A. No, they were sent from places in New York State and Canada.

By Commissioner Rhea:

Q. The nine laborers were employed in Virginia to install these signals?
A. Yes, sir.
Q. The eleven signal men were brought from New York and Canada and employed by you and paid by you for putting in these signals?
A. Yes, sir.

By Mr. Pollard:

Q. How long did it take you to execute the work under the contract to which you have last referred?
A. From the time it was awarded?
Q. Yes.
A. The Amherst-Whittles work is not yet finished?
Q. How long have you been working on it?
A. I don't have the date, as I recall it, we started it in May or June.
Q. What knowledge, if any, have you of the employment of labor in Virginia on the installation work done by your Company between Seminary and Orange?
A. I don't believe I quite understand you.
Q. I say, what knowledge have you, if any, of the amount of labor employed in Virginia on your installation work between Seminary and Orange on the Southern Railway?

A. It would approximate that being used on the present work; the proportion would be relatively the same.

Q. Is the contract about the same in extent as the one between Amherst and Whittles?

A. The Seminary to Orange contract is larger.

Q. How much larger?

A. Roughly, I should say, probably twenty per cent.

Q. Is that work of installation going on in the State of Virginia?

A. No, that was finished quite some months ago; I don't know the exact date.

Q. Do you know where these contracts were signed by the officers of the Southern Railway Company?

A. My belief from the correspondence is that they were actually signed in Washington; Mr. Spencer, I remember, wrote one letter dated Washington.

Q. During the construction of the work by your Company from Orange to Seminary, did you personally visit the men who were actually doing the work?

21 A. No, sir, I did not.

Q. Then you have no personal knowledge of what the men who represented your Company and installed your signal system under this particular contract; have you any personal knowledge of their acts?

A. Only in a general way. I have general charge of our installation work.

Redirect examination.

By Mr. Satterlee:

1st Q. Mr. Moffett, according to this Amherst-Whittles contract (and for that matter, others, but I will confine my questions to this), certain foundation work is furnished by the Railway Company upon which you erect your signals?

A. At the power houses, yes.

2nd Q. Exhibit 8, I think, shows a pole—that wooden pole is not put up by the Signal Company, is it?

A. I can't say as to the Southern, some roads furnish them and we put them up.

3rd Q. You don't know in this particular case?

A. No, sir.

4th Q. Please say when you began work on this installation at Amherst-Whittles?

A. We commenced work in April or May, I think.

5th Q. Are you sure of that—in Virginia?

A. No, we did not begin work in Virginia until the men got there—I think that was May or June.

The Chairman: I see in connection with this contract that you have mentioned work between Monroe and Montview, Va., did you do something different at those places?

A. We contracted to change that to conform to the alternating current system.

Q. There was extra work to be done by your Company?
A. Yes, sir.
Q. Something is said about standard painting for signals—do you employ painters?
A. They may not be experienced painters; we employ painters.
Q. You do that painting in Virginia, through your agents?
A. We do part at the factory and the last coat is applied in Virginia.
Q. You ship large quantities of material in order to do this work in the State?
A. Yes, sir.
22 Q. Who owns that material when it crosses the line of the State?
A. I don't know that I can tell you; I suppose the ownership remains with us until we get paid.
Q. That is a legal question, I won't press it—what is the authorized capital of your Company?
A. Three millions common stock, two millions preferred stock.

And further this deponent saith not.

Testimony for Commonwealth of Virginia.

J. G. HIDEN, a witness introduced on behalf of the Commonwealth of Virginia, testified as follows:

By Mr. Pollard:

Q. Will you please state what your occupation is and where you reside?
A. Attorney-at-law, Culpeper, Va.
Q. Will you state whether or not you are acquainted with any work which was done by the General Railway Signal Company in the County of Culpeper?
A. Yes, sir.
Q. Explain to the Commission the character of the work being done by that Company in your County?
A. As I understand it, they constructed an electrical signal system between, I thought Alexandria and Orange; but I suppose it is from Seminary, a small station just outside of Alexandria, to Orange, a distance I suppose of about sixty miles; that was constructed by the Signal Company. The way it was brought to my attention, Mr. G. H. Marsh, a resident of the town of Culpeper, a man who has resided in the town all his life, came to me in March of this year, and stated that he had been injured, while working for the General Railway Signal Company, on the 23rd day of March, 1914. His hand was mashed and partly amputated. I thought he had a case, after looking into the facts, and so advised him. At that time I did not know who had put this system in, and I thought he was working for the railroad company. He had not stated when he called at my office and I applied to the railroad company to know if they would settle the case out of court. They sent one of their

claim agents to my office and advised me that they had nothing to do with the matter, that the General Railway Signal Company were independent contractors and that I would have to look to them. I investigated the matter further and I found that Mr. Marsh
23 at the time of his injury was working with a gang, which he tells me was employed by the General Railway Signal Company, composed of a foreman named Morrison and five other employees, some from the county of Culpeper, some from the county of Prince William and some from other points.

Q. In Virginia?

A. In Virginia, and some out of Virginia, I think.

Q. Mr. Bailey, one of the employees, lived at Culpeper; Mr. Myers lived at Manassas and Mr. Carson at the time was living at Culpeper; I think he has since left there. I then applied to the General Railway Signal Company to know if they would settle this matter. They replied that they were insured with the Casualty Company of America against all liability for damage to their employees and to take the matter up with them. I took the matter up with them, and they refused to consider the matter, or did not consider it, and I then instituted suit in the Circuit Court of Culpeper County and endeavored to get service on their employees; but they had by that time completed their work, or about completed it, and the only employee left on the work was a superintendent, who was going up and down the track putting this thing into operation. I sent processes to the different counties and instructed the sheriff to levy them. They all failed to serve them, except the sheriff at Orange, who did serve it; but he failed to serve it ten days before the return day and the Signal Company and the Casualty Company moved to quash the service on that ground and it was quashed. I then applied to the State Corporation Commission to know if the General Railway Signal Company had a statutory agent on whom process could be served, and they advised that they did not. I then took a shot at it, and proceeded by attachment, presuming that the Southern Railway had probably not settled with them, and proceeded on the ground that this Company had a right to file a mechanic's lien on the system which they constructed in Culpeper County. I had that served on the agent of the Southern Railway and then took it up with Mr. Plant, the Auditor. Mr. Plant referred me to one of the vice-presidents, who informed me they had not paid the last payment due this Company, some twenty odd thousand dollars, and that was held up by this attachment and by order of the court is still being held up, or part of it, awaiting the termination of the suit by Mr. Marsh for damages.

Q. Did you personally observe the manner in which this Company did this work in your county or any other county in Virginia?

A. Yes, I had occasion to go frequently along the line of this railroad while this work was in progress. Your cut shows it as it is. They constructed these pipe lines or connections and put up those masts which hold those signals, and the wires connect-
24 ing the signals, and they put one of those masts or signals, I believe, every two miles along the track between Seminary

and Orange. The theory is that when the train runs over the signal it throws it at "danger" and it stays throwed at "danger" until it runs over the next signal two miles beyond, and then it is thrown back to safety.

Q. So far as you know, has this Company employed any men or purchased any material in the State of Virginia in the construction of this work between Seminary and Orange?

A. I don't know anything about the purchasing of material. I know that they employed Mr. Bailey and Mr. Marsh, who had lived all their lives in the county of Culpeper.

Q. Do you know that they did work in Virginia in constructing this system?

A. Yes, they were employed during the whole time the work was being installed.

Q. Do you know how long it took to install this system?

A. I can't give the dates, but several months, certainly two months.

Q. Do you know whether at that time they had at work labor employed in the State of Virginia?

A. I think that Mr. Bailey and Mr. Marsh (the only two gentlemen I am acquainted with personally) were employed there a large part of the time, possibly all of it.

The Chairman: Do you know who actually employed Mr. Marsh or Mr. Bailey?

A. I do not know exactly, except what they told me—that they were working for the Signal Company, under Mr. Morrison, their foreman.

Q. Mr. Morrison was working in Culpeper County?

A. Yes, sir.

By Commissioner Rhea: You know that the Southern Railway denied that they had anything to do with it?

A. Yes, sir; they sent a representative to me at my office, who denied that they had anything to do with it.

And further this deponent saith not.

For Defendant.

WILLIAM LOWENTHAL, another witness called on behalf of the Defendant, testified as follows:

By Mr. Satterlee:

Q. Mr. Lowenthal, you are in the employ of the General Railway Signal Company?

25 A. Yes, sir.

Q. Do you know of your personal knowledge when the installation in Virginia of the signal system under the contract in evidence was started?

A. On July 28th.

Q. Of what year?

A. 1914.

Q. I asked Mr. Moffett whether in the case of the present installation the wooden poles shown in Exhibit 8 were put up by the General Railway Signal Company or by the Southern Railway Company?

A. They were furnished and erected by the Southern Railway Company.

Cross-examination.

By Mr. Pollard:

Q. Take the cut and show what poles you are referring to in the evidence just offered—you refer to the cut mentioned in "Exhibit 8" with Mr. Moffett's testimony?

A. Yes, sir.

Q. The Southern Railway Company erected all poles and you erected all the structures which are placed upon the poles?

A. The Southern Railway furnished and installed the poles and all the wires and other fixtures on the poles, except the transformers, which we furnish and install.

Q. Have you ever worked in Virginia in the installation of any system for the General Railway Signal Company prior to this time?

A. No, sir.

Q. Are you working now?

A. Yes, sir.

Q. Where are you working?

A. Between Amherst and Whittles.

Q. How many men have you employed on that work now?

A. About 22 men.

Q. How many of those men were brought from your headquarters and how many employed in Virginia?

A. Including myself, fifteen men came from outside the State of Virginia, the remainder were hired in Virginia.

Q. Do you know a Mr. Morrison, who represented your Company in the installation of the system between Seminary and Orange, in the State of Virginia?

A. No, sir.

Q. Never heard of him?

A. Have heard of him, but have never seen him.

Q. What position does he hold with your Company?

26 A. He is a foreman.

Q. Is he an expert electrician, or simply a workman?

A. He must be an expert, or they would not have him as a foreman.

Q. He has charge of the hiring of labor for your Company in Virginia?

A. No, sir, the general foreman hires the labor.

Q. Who is your General Foreman?

A. On that particular installation I think Mr. C. Twitcher was the general foreman.

Q. Mr. Morrison was under him?

A. Yes, sir.

Q. What duties would Mr. Morrison perform?
A. He would do one particular kind of work, with a small gang of men.
Q. He had the right to employ and discharge men in his gang, didn't he?
A. I don't know how he did it; usually the general foreman hires and discharges men.
The Chairman: Is the general foreman down there on the road?
A. Yes, sir.
Q. He is down there on the road employing and discharging men?
A. Yes, sir.
Q. How far apart are these signals?
A. Average about two miles.
Q. When do you expect to finish on your present job?
A. About December 1st.

Redirect-examination.

By Mr. Satterlee:

Q. Does that represent the time actually required to do it, or have you been delayed by the Railway Company failing to furnish facilities?
A. We could do the work in three months, but the Railway Company is very slow and that holds us back.
The Chairman: How do you manage about the pay-rolls down there?
A. I sign all pay-rolls and the money is sent from Rochester.
Q. You pay the people down there?
A. Yes, sir.

27 By Mr. Pollard:

Q. In Virginia?
A. Yes, sir.
Q. You went to work you stated on the 28th of July—you mean the Amherst-Whittle work began then?
A. Yes, sir.

Redirect-examination.

By Mr. Satterlee:

Q. When you leave here, you are going to Australia to instal a system there?
A. Yes, sir.

The Chairman:

Q. You will be working in Australia then, won't you?
A. Yes, sir.

And further this deponent saith not.
By Mr. Satterlee: If it please the Court, may I ask if they will

grant me time to file a brief in this case, or do they wish to make a decision in the case now?

The Chairman: We will give you any reasonable time that you desire to file a brief. Of course, we rely upon you to see that none of the Company's effects are removed from the State pending a decision in the case.

Mr. Satterlee: Certainly.

(Copy.)

Subject A. C. Auto Block,
Southern Ry.
Est. 313.

COMMONWEALTH OF VIRGINIA at the relation of THE STATE CORPORATION COMMISSION.
v.
GENERAL RAILWAY SIGNAL COMPANY.

Rule.

General Railway Signal Company,
Rochester, N. Y.

28 MOFFETT EXHIBIT # 1.

May 5, 1914, RFB. WA.

Southern Railway,
Estimate 313,
Estimate 314,
Estimate 315.

Mr. C. R. Craig, Purchasing Agent, Southern Railway, Washington, D. C.

DEAR SIR: I beg to acknowledge receipt of your letter of May 4th, 1914, accepting our letter proposals of May 1st, 1914, for the installation of three Alternating Current Automatic Signal Systems, one between Amherst and Whittles, Va., one between Howell and Austell, Ga., and one between New Holland and Atlanta, Ga.

We have already placed orders in our factory for shipment of materials, and would thank you to send us contract forms for signature, at your early convenience.

Yours very truly,

M. R. BRINEY,
Resident Manager.

WASHINGTON, D. C., May 4, 1914.

M. A. Briney, Esq., Resident Mgr., General Railway Signal Company, 55 Liberty St., New York City.

DEAR SIR: Confirming telephone conversation today:

We accept your proposal to install automatic alternating current signals between Amherst and Whittles, Howell and Austell and New Holland and Atlantic for $189,656.00, these figures being on the same basis as the Knoxville-Morristown contract.

Faithfully yours,

(Signed) C. R. CRAIG,
Purchasing Agent.

29. May 1, 1914.

Southern Railway Company, Mr. C. R. Craig, Purchasing Agent, Washington, D. C.

DEAR SIR: Please find herewith proposals for which we recently received request from you for bids:

New Holland to Atlanta.
Howell to Austell.
Amherst to Whittles.

The price quoted in each instance has been arrived at by applying the unit prices on which our Morristown to Knoxville proposal was based, from which unit prices a deduction of five per cent. was made as agreed upon when the order for the Morristown to Knoxville work was placed with us. You are, therefore, receiving in proportion the same favorable prices on the work referred to above as was secured by you on the Morristown to Knoxville installation.

Any additions to or reductions from the work covered in our bid to be charged or credited as the case may be on the same basis.

Referring to proposals sent you herewith, I should like to call your attention to the following:

We have not included in the prices quoted the cost of the bonds required under your form of contract and if it is necessary to furnish such bonds, the cost of same would be added to the prices named. Neither have we sent with the proposals drawings of our apparatus, details specifications covering the same nor drawings of typical circuits, as all of these have been furnished you on previous work and you are thoroughly familiar with the devices, circuits, etc., which we propose to furnish if awarded the contracts mentioned herein.

New Holland to Atlanta Proposal.

Our proposal includes two 2-A Alternating Current, three position, upper quadrant power signals for the Gainesville Interlocking plant and new 110 volt three position direct current, top post mechanisms, 2-A signals to replace the present old signals at the Belwood Avenue and Howe Interlocking on your main lines, together with all materials and labor required for indicators, annun-

ciators, electric locks, changes in interlocking machines and switch boards required under Southern Railway Specifications.

30 Howell to Austell Proposal.

Our proposal includes at Austell two-power operated, three position, upper quadrant, alternating current, 2-A signals together with indicators, electric locks, annunciators and labor for applying required under Southern Railway Specification.

At Mountview and Leftwitch we will furnish at each of the interlocking plants two power operated, three position, upper quadrant, alternating current, 2-A signals together with all indicators, electric locks and annunciators as well as the labor for applying same as required under the Southern Railway Specification.

Amherst to Whittles Proposal.

Proposal includes the furnishing of new signals, annunciators, locks at interlocking plants shown on plants and referred to in specifications, together with new signals and indicators and the necessary labor for applying same.

On that portion of the work between Monroe and Mountview where there is now installed a system of direct current signaling we have figured on furnishing complete in place new alternating current apparatus as though there were no signaling now installed. The direct material so replaced to be the property of the Southern Railway Company and to be removed by their forces. If desired we will use as much of this material as possible in the new installation and allow credit to the Southern Railway Company for same satisfactory to both parties.

We have made up no detailed estimate as to the cost of direct current installation in place of alternating current covered in our proposals, but would state that the cost of a direct current installation will be approximately the same as the alternating current on which we have named you prices.

Very truly yours,

GENERAL RAILWAY SIGNAL COMPANY,
Per M. R. BRINEY, *Resident Manager.*

Est. 313.

May 1, 1914.

Southern Railway Company, Mr. C. R. Craig, Purchasing Agent, Washington, D. C.

DEAR SIR: Referring to your request that we submit to you a proposal covering a system of Alternating Current Signaling
31 on your lines between Amherst and Whittles, Virginia.

I beg to advise you that we will furnish materials and erect complete a system of alternating current signals on your line between Amherst and Whittles, Virginia, consisting of eighty-two signals, eighty-two track circuits, one hundred Twenty-two protected switches,

power apparatus for three power plants, revision of two interlocking plants, one at Mountview, the other at Leftwitch, together with all other materials and labor required for a complete installation as called for on your plan S. D. 1743, dated February 20, 1914, latest revision April 10, 1914, for the sum of 85,597.

Payment to be made as specified in the Southern Railway's form of agreement received with your request for bids.

All materials and labor required for the complete installation to conform with the requirements as set forth in your specifications, entitled Specification for Alternating Current Automatic Signaling System between Amherst and Whittles, Virginia, together with drawings attached thereto.

If awarded your contract, we will execute the Southern Railway's form of agreement accompanying specifications and plans referred to above.

Very truly yours,
GENERAL RAILWAY SIGNAL COMPANY,
Per M. R. BRINEY, *Resident Manager.*

May 1, 1914.

Southern Railway Company, Mr. C. R. Craig, Purchasing Agent, Washington, D. C.

DEAR SIRS: Referring to your requests that we submit to you a proposal covering a system of Alternating Current Signaling on your lines between Howell and Austell, Georgia.

I beg to advise you that we will furnish materials and erect complete a system of alternating current signals on your line between Howell and Austell, Georgia, consisting of twenty-one signals, twenty-two track circuits, fifty-five protected switches, power plant apparatus for two power plants, revision of one interlocking plant at Austell and all other material and labor required for complete installation as called for on your plan S. D. 1744, dated March
32 3, 1914, latest revision April 10, 1914, for the sum of 26,131.

Payment to be made as specified in the Southern Railway's form of agreement received with your request for bids.

All materials and labor required for the complete installation to conform to the requirements as set forth in your specification, entitled Specification for Alternating Current Automatic Signal System between Howell and Austell, Georgia, together with drawings attached thereto.

If awarded your contract, we will execute the Southern Railway's form of agreement covering specifications and plans referred to above.

Very truly yours,
GENERAL RAILWAY SIGNAL COMPANY,
Per M. R. BRINEY, *Resident Manager.*

Est. 315.

May, 1, 1914.

Southern Railway Company, Mr. C. R. Craig, Purchasing Agent, Washington, D. C.

DEAR SIRS: Referring to your request that we submit to you a proposal covering a system of Alternating Current Signaling on your lines between New Holland and Atlanta, Georgia.

I beg to advise you that we will furnish materials and erect complete a system of alternating current signals on your line between New Holland and Atlanta, Georgia, consisting of seventy-one signals, seventy-eight track circuit-, one hundred and twelve protected switches, power plant apparatus for two power plants, revision of three interlocking plants located at Belwood Avenue, Howell, Georgia, and Gainesville, and all other materials and labor required for complete installation as called for on your plan S. D. 762, dated January 15, 1912, latest revision April 10, 1914, for the sum of 77,928.

Payment to be made as specified in the Southern Railway's form of agreement received with your request for bids.

All materials and labor required for the complete installation to conform with the requirements as set forth in your specification, entitled Specification for Alternating Current Automatic Signal System between New Holland and Atlanta, Georgia, together with drawings attached thereto.

33 If awarded your contract, we will execute the Southern Railway's form of agreement accompanying specifications and plans referred to above.

Very truly yours,

GENERAL RAILWAY SIGNAL COMPANY,
Per M. R. BRINEY, *Resident Manager.*

COMMONWEALTH OF VIRGINIA at the RELATION OF the STATE CORPORATION COMMISSION.

v.

GENERAL RAILWAY SIGNAL COMPANY.

(Rule.)

MOFFET EXHIBIT #2. (PART 1).

This agreement, made and entered into this 29th day of September, 1914, by and between

General Railway Signal Company, a corporation organized and existing under and by virtue of the laws of the State of New York, hereinafter for convenience styled the Contractor, party of the first part; and

Southern Railway Company, a corporation organized and existing under and by virtue of the laws of the State of Virginia,

nafter for convenience styled the Railway Company, party of
econd part;
tnesseth: That
hereas, the Railway Company proposes to have its line of rail-
extending from Amherst to Whittles, in the State of Virginia,
ped with alternating current electrically controlled automatic
hore block signals, with the necessary apparatus and appurte-
s for the operation thereof; and
hereas, the bid of the Contractor for the work of installing said
ls has been accepted by the Railway Company, and the Con-
r will install the same at and for the prices and upon the terms
onditions hereinafter mentioned and expressed;
w, therefore, in consideration of the sum of money hereinafter
d to be paid to the Contractor by the Railway Company, and
e covenants of the Railway Company upon its part to be kept
performed as hereinafter expressed, the Contractor hereby
ants and agrees:

That the Contractor will furnish all such materials, supplies, machinery, devices and equipment (except such things which are to be furnished by the Railway Company, as mentioned in the specifications), as well as all such labor, skilled and un-
d, as may be necessary therefor, and will install, erect and put
ace the said signals and apparatus as shown upon plan SD-1743
d April 10, 1914, and more fully described in the specifications
e Railway Company, dated April 10, 1914, hereto attached and
a part hereof marked "Exhibit 'A'," and will complete the
e system and turn the same over to the Railway Company as a
ed job, subject to inspection and acceptance by its Chief En-
r of Maintenance of Way & Structures, or his duly authorized
sentative, within not more than six (6) months from the date
ese presents; all of said work to be done in strict accordance
the plans and specifications which are hereunto annexed and
a part of these presents as the same are written and prepared,
s and except the same are modified as herein provided.

That it, the Contractor, hereby guarantees that the energy con-
tion of the apparatus herein contracted for at sixty cycle, single
, 4400 volts at the bus bars will not exceed 10 K. W.

That the work to be done by the Contractor hereunder, while
s to its details or as to its methods under the direction, shall, at
mes during its progress, be subject to the inspection and super-
n, and, before its acceptance by the Railway Company, to the
oval, of the Chief Engineer of Maintenance of Way and Struc-
of the Railway Company, or other properly authorized officer
ent of the Railway Company.

It is hereby distinctly understood and expressly agreed by the
ractor that any disagreement or dispute between the Contractor
the Railway Company relating to this agreement, or to the
plans and specifications, or to work to be performed or ma-
s to be furnished hereunder, or in regard to monthly
al estimates, shall be referred to the Chief Engineer of Main-
ace of Way and Structures of the Railway Company, whose

interpretation or decision shall be accepted by, and be conclusive and binding upon, both the parties hereto.

5. That the Contractor shall indemnify and save the Railway Company harmless from and against all loss or damage, claims, suits, recoveries, judgments, costs or expenses, which may accrue or may be made, had, brought or recovered from or against the Railway Company by reason or on account of the work, material, tools, implements, machinery, fixtures, or anything used in or about the work to be performed under this contract, being infringement of Letters Patent issued by the United States or any foreign country.

6. That it, the Contractor, will assume all responsibility for any damage which will happen to the work provided for in this contract from fire, floods, storms or any other cause whatsoever, prior to the final completion and acceptance thereof.

7. That if at any time the work is not progressing to the satisfaction of the Chief Engineer of Maintenance of Way & Structures of the Railway Company, he may so notify the Contractor in writing, and if the progress of the work fails to show an immediate improvement satisfactory to the Chief Engineer of Maintenance of Way & Structures of the Railway Company, he may, in his discretion, for failure of the Contractor to employ upon or to prosecute the work with adequate force, or equipment or for omission or neglect of, or failure to comply with, any of the requirements of this agreement, on the part of the Contractor, declare this contract forfeited, which declaration of forfeiture, made in writing and served upon the Contractor, shall exonerate the Railway Company from any and all liability and obligation arising under this contract, and the Railway Company shall have full power and authority to enter upon and take possession of the work, and complete the same or contract with any other person or persons for its completion.

8. That the Contractor will, and hereby does, assume as a general contractor, all the risks of damage to property or personal injury done by it or its servants or employees in the course of the work undertaken, and, moreover, agrees to indemnify and save harmless the Railway Company against any and all claims and liabilities arising out of any risks accruing to the Contractor or to any agents, servants or employees of the Contractor incident to the work undertaken to be done by the Contractor hereunder, however the same may accrue.

9. That any certificate given or payment made on account of the contract for material, or labor actually applied on finished work, shall not operate as an acceptance of any materials or work which may subsequently be found to be defective, by reason of inherent faults or arising from accidental injury or otherwise, before the completion of the contract and its acceptance by the Railway Company.

10. That no claim for extra work shall, under any circumstances be made by the Contractor unless the same shall have been done in pursuance of an order given in writing by the Chief Engineer of Maintenance of Way and Structures of the Railway Company.

And the Railway Company hereby covenants and agrees, in consideration of the covenants and agreements of the Contractor:

11. That it will pay unto the Contractor for the said work hereby undertaken to be done by the Contractor the prices specified in the unit price list submitted by the Contractor hereto annexed and made a part of this agreement marked "Exhibit 'B' "; Provided, however, that the total amount to be paid to the Contractor by the Railway Company shall not exceed the sum of Eighty-five Thousand, Five Hundred and Ninety-seven Dollars ($85,597.00), (unless the said amount shall be increased or diminished as provided in Article 14 of this agreement); payment to be made in monthly settlements as the work progresses: that is to say, on or about the first of each month, beginning with the second month, the Engineer, or other representative of the Railway Company, supervising the work shall prepare and certify an estimate of the value of the work done up to the end of the preceding month, and upon such estimate, when approved by the Chief Engineer of Maintenance of Way and Structures of the Railway Company, a voucher shall be issued by the Railway Company in favor of the Contractor, payable in the usual course of business of the Railway Company; Provided, however, that the Railway Company may retain fifteen per cent. (15%) of the amount of each such estimate until the final payment to the Contractor becomes due upon the approval of the work by the said Chief Engineer of Maintenance of Way and Structures of the Railway Company and its acceptance by the Railway Company as complete; and, Provided Further, that, before any payment, final or otherwise, shall be considered due hereunder, the Railway Company may require of the Contractor proof satisfactory to the Railway Company that the said Contractor has duly paid and satisfied all labor, material and other claims accruing on account of said work and that the same is free from all labor, material or other liens to which the same might be subjected by any action or default of the Contractor or any sub-contractor, agent, servant or employee of the Contractor and that the Railway Company is not liable to be subjected to any liability to any sub-contractor or other claimant in respect of said work.

12. That, in addition to the money payments to be made to the Contractor by it, as aforesaid, the Railway Company will
37 furnish such material as the annexed specifications marked "Exhibit 'A' " requires to be furnished by the Railway Company, and, to the extent that it may lawfully do so, will furnish free transportation over its lines of railroad for men and material used and employed in said work by the Contractor; Provided, however, that the free transportation to be issued to the Contractor for the workmen or employees of the Contractor, as aforesaid, shall be used by them only, and only by them while traveling on the business of the Contractor in connection with said work; and Provided Further, that the Railway Company shall not be liable under any circumstances, whether of negligence of its agents, or employees, or otherwise, for the death of, or personal injury to, any of the workmen or employees of the Contractor, or for the loss of, or injury or damage to, any tools, appliances, materials or property of the Con-

tractor, while being so transported by the Railway Company hereunder, and the Contractor hereby agrees to indemnify and save harmless the Railway Company against the consequences of any such personal injury or property loss or damage.

And it is Mutually covenanted and agreed by and between the parties hereto:

13. That whenever and wherever reference is made in this agreement to specifications, such reference shall be taken to mean the specifications of Southern Railway Company dated April 10th, 1914, hereto attached, marked "Exhibit 'A.'"

14. That the Chief Engineer — Maintenance of Way & Structures of the Railway Company shall have the right to prescribe in writing to the Contractor any alterations in the plans or specifications that may hereinafter be determined by him to be necessary or desirable. That, in the event that such alterations increase the quantities of material to be furnished or work to be performed by the Contractor, the Contractor shall be paid for such excess at the unit rates as set forth in Exhibit "B" hereto attached. In the event that such alterations decrease the quantities of material to be furnished or work to be performed, the amount hereinbefore agreed to be paid by the Railway Company to the Contractor shall, on account of such decrease in quantities, be reduced at the unit rates as set forth in said Exhibit "B." In the event that any such alterations diminish the quantity or extent of work to be done, the Contractor shall not have any claim for damages for loss of anticipated profits, nor on any account whatever with respect to work which may be altered or dispensed with, the intention of this provision being that only the work actually done shall be paid for.

38 In Witness Whereof, the parties hereto have executed these presents the day and year first above written.

GENERAL RAILWAY SIGNAL COMPANY,
By GEORGE D. MORGAN, *Vice-Pres. & Treas.*
Oct. 3, 1914.

In presence of:

J. F. BRAAM,
F. W. MOFFETT,
As to Contractor.

SOUTHERN RAILWAY COMPANY,
By H. B. SPENCER, *Vice-President.*

In presence of:

H. F. PIERCE,
JOS. K. DAVIS,
As to Railway Company.

A true copy—Teste:

GEO. R. ANDERSON,
Assistant Secretary, Southern Ry Co.

Washington, D. C., October 13, 1914.—C.

EXHIBIT "B."

Schedule (A).

Covering Alternating Current Signaling for Steam Roads.

1. For Each Signal Arm $491.14
The above unit price includes (*a*) the signal complete with lamps and roundels and with either top or bottom mast mechanisms; (*b*) the necessary line relays, terminals and housings; (*c*) the necessary operating current transformers and hangers; (*d*) the necessary lightning arresters, grounds and housings; (*e*) the necessary rubber covered wire, trunking, stakes for connections between track, relays, signal, transformers and pole line, and (*f*) the necessary sundry materials and labor required to make the unit ready for service.

39

2. For Each Main Bracket Post 240.35
The above unit price includes the main bracket post erected complete with ladder and platform ready for the reception of signal masts.

3. For Each Track Circuit Section 300.96
It is understood that the section of track between the point at which energy is applied and the point at which the relay is attached shall be considered as a track circuit section. This unit price includes (*a*) the track relay, terminals, lightning arrestors and housings; (*b*) the necessary track transformers and supports; (*c*) the necessary bond wires and channel pins; (*d*) the necessary rubber covered wire, trunking and stakes for connections between track, relay, transformer and pole line, and (*e*) the necessary sundry material and labor required to make the unit ready for service.

4. For Each Switch With Indicator 156.75
The above unit price includes (*a*) a switch box with connections to switch; (*b*) the indicator and support; (*c*) all necessary terminals, lightning arresters and housings; (*d*) the necessary rubber covered wire, trunking and stakes for connections between track, switch box, indicator and pole line; (*e*) the necessary switch rod insulations, and (*f*) all necessary sundry materials and labor required to make the unit ready for service.

5. For Each Switch Without Indicator 52.25
The above unit price includes (*a*) the switch box with connections to switch; (*b*) the necessary rubber covered wire, trunking and stakes for connections between track, switch box and pole line; (*c*) the necessary switch rod insulations, and (*d*) the necessary sundry materials and labor required to make the unit ready for service.

6. For Power Equipment .....As follows:
(*a*) For each 5 KVA transformer $104.50
(*b*) For each 7½ KVA transformer 122.26
(*c*) For each 10 KVA transformer 141.08
(*d*) For each 12½ KVA transformer 158.84
(*e*) For each 15 KVA transformer 177.65
(*f*) For each 20 KVA transformer..... 214.23
40 (*g*) For each 25 KVA transformer 250.80
(*h*) For each 5 KVA motor generator set... 522.50
(*i*) For each 10 KVA motor generator set..... 585.20
(*j*) For each additional 5 KVA capacity motor generator set up to 75 KVA add 114.95
(*k*) For each switch board controlling one (1) feeder, one (1) transformer, one (1) motor generator set and one (1) regulator for signaling current 783.75
(*l*) For control of each additional feeder, transformer on motor generator set, add to (*k*)..... 167.20
(*m*) For control of each additional regulator, add to (*k*) 355.30

The above unit prices include (*a*) the various apparatus required; (*b*) the necessary rubber covered wire for connections between the various devices, and (*c*) the necessary sundry materials and labor required to install same (in the space and on foundations provided by the Purchaser) and make the unit ready for service.

Schedule (B).

Covering Work Incidental to Carrying Automatic Signaling Through Existing Interlocking Plants.

When necessary to carry automatic signaling systems through existing interlocking plants, the Contractor agrees to furnish the necessary materials, tools and labor required for changes in or additions to such existing interlocking plants, provided such changes or additions shall be made while the Contractor's forces are engaged on such automatic systems, on the following basis:

1. To furnish materials of its own manufacture as required, at list prices less fifty per cent (50%) discount, delivered f. o. b. destination.
2. To furnish purchased materials as required, at cost plus fifteen per cent (15%) delivered f. o. b. destination.
3. To furnish labor at cost plus fifteen per cent (15%). Such labor cost to include time and expenses of men as shown by payrolls and foreman's expense accounts, incidental to the work of such changes or additions.
4. To furnish plans for changes or additions at each plant for $14.25

41 (Rule.)

COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION.

v.

GENERAL RAILWAY SIGNAL COMPANY.

MOFFET EXHIBIT # 5.

Alternating-Current Signal System, Southern Railway, Amherst to Whittles, Virginia.

The system of normal clear, alternating-current, automatic block signaling as called for under the specifications and plans of the Southern Railway for the portion of its double-track main-line between Amherst and Whittles, Va., consists of a series of electric semaphore block signals as shown on Exhibit Photo "A" so located along the track (usually from one to two miles apart), as to provide under proper observance of the signals, a definite space interval between trains upon the same track.

These signals are what is known as the three-position type: that is the signal arm or blade is made to give three indications, namely:

1. A horizontal position (See Exhibit B), which indicates danger and means stop;
2. An inclined position (See Exhibit C), which indicates caution and means proceed at a reduced speed prepared to stop at the next signal; and
3. A vertical position (See Exhibit D), which indicates that the track is clear or unoccupied for two blocks in advance and means proceed at normal or regular speed to the next signal.

The arms or blades of these signals give the indications by day and at night the position of the arm is indicated by the use of colored lights.

1. Red means stop, corresponding to the horizontal position of the arm;
2. Green means caution, corresponding to the inclined position of the arm, and

42 3. White meaning proceed at speed corresponding to the vertical position of the arm.

The signals are operated by electric motors connected by a train of gears to the shaft of the arm or blade. The electric current to the motors is controlled through what is called a circuit breaker of special design attached to the shaft of the signal arm. The motor gears and circuit breakers are all enclosed in a suitable iron case which is clamped to the signal mast or pole. (See Exhibit "E.")

The semaphore arm or blade is supported by a spectacle casting which is mounted on and revolves with the semaphore shaft, carrying the colored roundels for the night indications. The spectacle casting is so designed that (with or without the blade in place) when electric current is not flowing through the signal motor, the spectacle casting and blade fall by gravity to the normal or horizontal position. This is what is known as the closed circuit principle, which insures the display of a stop indication if there is any unsafe condition or if some part of the system fails.

The operation of the signals is controlled by continuous alternating-current track-circuits, the arrangements being such that a train in the block or any unsafe condition—misplaced switch, broken rail, etc.—or the failure of some part of the system—defective appliances, broken wires, etc.—causes the display of a stop indication at the signal governing use of the block so affected. This is accomplished by operating the track-circuit on the closed circuit principle.

A track circuit consists of:

1. A section of track insulated, by means of insulated joints, from adjoining sections, also insulated transversely by means of insulated switch rods, switch plates, etc., the adjoining rails in the track circuit being bonded together by wires known as bond-wires;

2. A track relay (shown in Exhibit "F"), connected to the track rails at one end of the track-section; and

3. A source of electrical energy connected to the track rails at the other end of the track-section, as shown on Exhibit "G."

Normally, current from the source of electrical energy flows through rail (*a*) then through the coils of relay R and back over rail (*b*) to the source of energy, thus forming a complete electric circuit which energizes the coils of relay R and its armature (A) is attracted to contact (*a*) as shown. In this, the normal condition,

43 current from the source of electrical energy (through another connection) flows through the motor of signal 1 which operates to the clear or proceed position as shown in Exhibit "G."

If a train—represented by the axle and pair of wheels at X—enters the block governed by signal 1, current from the source of energy flows through rail (*a*) then through the axle and wheels at X (also through every wheel and axle in the train to the left of signal 1) then through rail (*b*) back to the source of energy so that practically no current flows through relay R, which becomes de-energized, and armature A falls by gravity to a neutral point midway between contacts (*a*) and (*b*), thus cutting off current from source of energy through the motor of signal 1 and its semaphore arm

falls by gravity to the horizontal or stop position, where it remains until the train passes beyond signal 2.

It is evident from Exhibit "G," that any break in the continuity of the track-circuit such as a broken or misplaced rail would cut off energy from the track-relay R which would become de-energized and its armature A would fall by gravity to the neutral position and open the motor-circuit, so that the semaphore arm would fall by gravity to the horizontal or stop position in the same manner as if a train were in the block.

Main-line switches, also switches leading to the main-track, are equipped with a device known as a switch circuit controller shown in Exhibit "H," which consists of several contacts connected to the switch points in such a manner that a movement of the switch rails produces a corresponding movement of the circuit-controller contacts.

One side of the track-circuit is connected to one set of contacts and the opposite side of the track-circuit to another set of contacts. Normally, the contacts are open but the adjustment is such that if the switch points were open three-sixteenths of an inch or more, the contacts would close forming a short circuit which would de-energize the track-relay R and cause the display of a stop indication in the same manner as a train in the block.

In addition to being controlled by its respective track circuit, each signal is also controlled by the position of the signal in advance, as, for example, the position of signal 1 depends upon, first, the condition of the track circuit between signals 1 and 2, through track relay R, and, second, upon the position of signal 2. The design of the system is such that signal 1 cannot indicate clear or proceed unless the block governed by signal 1 and the block governed by signal 2 are unoccupied by a train and safe for the passage of a train. If the block governed by signal 2 is occupied or conditions unsafe for the passage of a train signal 2 indicated stop and signal 1 indicates "proceed with caution prepared to stop
44 at next signal" (provided that the block is unoccupied and conditions safe) in the following manner:

The mechanism of signal 2 is equipped with a circuit-controller contact which performs the function of a pole changer which reverses the polarity of the current flowing in the track circuit, when signal 2 is in the stop position, so that current flows from the source of energy through rail (*b*) then through relay R and through rail (*a*) back to the source of energy. This also completes an electric circuit through relay R which becomes energized but, owing to the flow of current in an opposite direction, armature A is attracted to contact (*b*) which closes another circuit, through a controller contact on signal 1, from the source of energy through the motor of signal 1 which operates signal 1 only to the 45 degree or caution position.

Exhibit "J" shows the position of successive signals in the rear of signal 3, which governs the use of the block occupied by a train. Signal 3 indicates stop as the block between signals 3 and 4 is occupied by the train; signal 2 indicates caution, displaying a dis-

tant indication for the stop indication at signal 3; and signal 1 indicates clear or proceed as two blocks in advance are unoccupied.

Electrical energy for operation of signals, signal lights, and track circuits is supplied by steam-driven generating equipment at the main power house situated at Monroe, and by auxiliary gasoline-engine generating equipment situated at Whittles. A second auxiliary supply, 2200 volt commercial current, is situated at Lynchburg.

The three independent sources of power insure a continuous supply of electrical energy for operation of the signal system; if one source fails the others are instantly available.

The current obtained at Monroe, Whittles and Lynchburg is stepped up by power transformers to 4400 volts, three-phase, 60 cycle which is transmitted by three stranded aluminum conductors, called the transmission line which extends throughout the length of the signal installation and is supported by suitable insulators and pins, mounted on poles.

High tension transmission—4400 volts—is necessary for economy in the size or weight of the electrical conductors, but is impracticable for operation of the signal system owing to the great danger of employes or others coming in contact with this high voltage which would cause instant death. For this reason the several units of the signal system are operated on low voltage; signal motors on 110 volts, signal lights on 12 volts and track-circuits on 5 to 10 volts according to length of the particular circuit.

At each signal location, the voltage of the transmission line is stepped down by a line transformer, one of which is shown in Exhibit "K," to 110 volts for operation of the signal motors. A secondary transformer shown in Exhibit "L" is connected to the low-tension windings of the line transformer and steps down the voltage for operation of signal lights and track circuits.

Line transformers are mounted near the wires on the transmission-line poles; secondary transformers are placed in the box, mounted on the signal pole, that contains the relays, terminals and connections.

Owing to its comparatively recent adoption, few railway signal engineers have a comprehensive working knowledge of alternating-current signaling and appliances which have been developed and perfected for the most part by the signal companies. For this reason practically all alternating-current signal-systems are designed and installed by one of the signal companies in which case the signal company's engineers prepare the plans, manufacture and install the signals and signaling appliances, and finally turn over to the railway company a complete signaling system guaranteed to operate as designed.

GENERAL RAILWAY SIGNAL COMPANY.

Rochester, N. Y.
FWR-GG.

September 14, 1914.

COMMONWEALTH OF VIRGINIA:

Department of the State Corporation Commission.

Judicial Case No. 420.

CITY OF RICHMOND, December 17th, 1914.

COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION
v.
GENERAL RAILWAY SIGNAL COMPANY.

(Rule.)

Rule under Sections 1104 and 1105 of the Code.

The Commission having maturely considered the evidence and the argument of counsel, and being of the opinion for reasons stated in writing and filed as a part of the record, that the defend-
46 ant company has violated Section 1104 of the Code of Virginia, as amended, by doing business in this State without first obtaining the certificate of authority therefor required by law: Therefore, it is considered by the Commission that the General Railway Signal Company render unto the Commonwealth of Virginia a fine of one thousand dollars ($1,000.00) and the costs incident to this proceeding, and unless the same shall be paid to the Clerk of the Commission within sixty days from this date that execution of fieri facias issue therefor, according to law.

COMMONWEALTH OF VIRGINIA:

Department of the State Corporation Commission.

Judicial Case No. 420.

COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION
vs.
GENERAL RAILWAY SIGNAL COMPANY.

(Rule.)

Rule under Sections 1104 and 1105 of the Code.

Opinion.

PRENTIS, *Chairman:*

This is a proceeding instituted under Section 1105 of the Code charging the General Railway Signal Company with doing business within the State of Virginia without having complied with Section

1104 of the Code, requiring every foreign corporation before doing business in this State to present to this Commission written powers of attorney appointing some person residing in this State its agent upon whom process against the corporation may be served, two duly authenticated copies of its charter and a certificate from the Auditor of Public Accounts showing the payment of the fee required by law of such foreign corporation.

The defendant is a corporation of the State of New York, having an authorized capital of $5,000,000. Its principal office and factory is at Rochester, N. Y., where it owns and operates a large manufacturing plant devoted to the manufacture of materials chiefly used in the construction of railway signals which it sells and constructs all over the world. It has a branch factory at Montreal, Canada, and maintains branch offices in New York City, Chicago, and San Francisco.

47 By contract dated the fifth day of May, 1914, with the Southern Railway Company, the defendant agreed to furnish certain materials, supplies, machinery, devices and equipment, as well as all necessary labor, and to install, erect, and put in place certain signals and apparatus shown on the plans and described in the specifications, from Amherst to Whittles, Virginia, 58 miles, and to "complete the entire system and turn same over to the railway company as a finished job," subject to inspection and acceptance, for $85,597. Similar contracts had been previously made and fully performed, one dated September 6th, 1911, covering the lines of the Southern Railway in Virginia from Monroe to Montview, Virginia, thirteen miles, for $16,015.00, and one dated July 18th, 1913, from Orange to Seminary, Virginia, seventy-six miles, for $112,428.00. The aggregate distance in this State covered by these contracts being 147 miles and the total consideration, being $214,040.00.

The purpose of these signals is to promote safety of railway operation and they operate automatically.

In order to construct these signals as required by the contract it was necessary to employ in this State, labor, skilled and unskilled, to dig ditches in which conduits for the wires are placed, to construct concrete foundations, and to paint the completed structures. The completed structures are along the side of the railway track, about two miles apart, and are twenty-two or twenty-three feet high. In the language of the witness, Moffett: "It is necessary to erect the signal mechanism, the masts supporting the mechanism, the houses for protecting the relays, reactors, reactants and other similar electrical devices protected from the weather, then the transformers, high tension line arrestors, low tension line arrestors," (page 14). The completed structures are permanently attached to the freehold upon concrete bases.

While counsel for the defendant insists that the main object of the transaction was to sell the materials which it manufactures in the State of New York, the contract and the letters leading up to the contract plainly show (unless the less includes the greater) that the main purpose plainly expressed was to erect, install and com-

plete the signal system in Virginia, and that the furnishing of the material was the necessary and preliminary incident of the contract.

The fact that the contract with the railway company was signed outside of Virginia and also that certain signalmen and skilled employees, were brought from New York to do a part of the work, is urged as an incidental reason for the defendant's contentions. This proposition, however, cannot be maintained, because not only the contract with the railway company but the incidental
48 contracts made with these skilled employees were to be performed in Virginia, and, therefore, the contracts are governed by the laws of Virginia.

London Assurance v. Companhia De Moagens Do Barreiro, 167 U. S. 160; 42 L. Ed. 120.

Andrews v. Pond, 38 U. S. 12; Peters 65; 10 L. Ed. 61.

Bell v. Bruen, 42 U. S. 1st Howard 169; 11 L. Ed. 89.

Bank of United States v. Daniel, 37 U. S. 12; Peters 54; 9 L. Ed. 997.

Scudder v. Union National Bank, 91 U. S. 406; 23 L. Ed. 245.

Graves v. Johnson, 156 Mass. 211; 15 L. R. A. 834.

It is claimed for the defendant that the main purpose of the transaction on the part of the defendant company was the sale of its manufactured products, and the transaction is alleged to be similar to the ordinary sale of goods by a dealer in one state to a purchaser in another state, and the transportation of the goods so sold in interstate commerce to the purchaser. The case of Robbins against Shelby County Taxing District, 120 U. S. 489, and similar cases are relied upon to sustain that claim.

Of course we have no intention of questioning the authority of that case or of the cases following it, of which it is the prototype. The case at bar, however, cannot be brought within the rule there established. The facts of this case show that the object of the Southern Railway Company, the purchaser, was to secure the erection of permanent structures upon its right of way, and not the purchase of goods to be transported in interstate commerce. In this transaction the interstate commerce ended when the materials shipped from the factory in New York were delivered not to the Southern Railway but to the defendant in Virginia. They then became a part of the property located in Virginia still owned by the defendant, liable to State taxation and no longer protected by the commerce clause of the Constitution.

It is well established that if such materials had been brought into this State for the purpose of storage that they would be liable to State taxes, and surely it follows that if after the transportation was ended, its owner changed their form from personal property into real estate by building them into permanent structures, such a disposition of its property in this State is not interstate commerce. Coal sent by the owners in Pennsylvania to their agents in New Orleans, to be there sold for their account upon its arrival becomes part of the general mass of property in Louisiana, and is subject to taxation in common with all other property, and in precisely the same manner. Brown against Houston, 114 U. S. 622;

29 L. Ed. 257. A license tax imposed upon meat packing houses for selling meat brought into the state in interstate commerce is
49 not a burden upon interstate commerce. Armour Packing Company against Lacy, Treasurer, 200 U. S. 226; 50 L. Ed. 451. The same principle is announced in Kehrer against Stewart, 197 U. S.; 60; 49 L. Ed. 666.

The American Steel & Wire Company v. Speed, 192 U. S. 500; 48 L. Ed. 538, is most instructive. The American Steel & Wire Company selected the City of Memphis as a distributing point for its product, securing a local transfer company to take charge of its products when shipped to that point, assort them, store them in the transfer company's warehouses, and to make delivery therefrom in the original packages, to its customers, ninety per cent thereof outside of Tennessee, either as expressly directed by it, or under general directions in favor of its recognized and approved customers, whose names were furnished to the transfer company. It was there held that when the goods reached the ware houses they had reached their destination and were liable to local taxation.

In this case the warehouses were rented by the transfer company, and the goods were delivered in the original packages; ninety per cent of them ultimately went to jobbers who resided beyond the limits of the State of Tennessee, and the remaining ten per cent were delivered to Memphis jobbers, all however in fulfilment of contracts previously made at Chicago. As we understand the principle definitely fixed by this case, the goods having come into the State of Tennessee as the property of the foreign merchant and at rest there and the interstate journey having terminated, the goods become liable to taxation in that State, and the delivery of the goods after they thus reached their destination constituted doing business in the state in which such deliveries were made.

In this case the court notes the distinction between imports in the legal sense, that is, goods brought into the state from abroad, which may be there freely sold in original packages, and goods transported from one state to another in interstate commerce.

The defendant here relies also upon the case of Pedersen against Delaware, L. & W. Railroad Co., 229 U. S. 146; 57 L. Ed. 1125. This case arose under the employers' liability act of April 22nd, 1908, giving the right of recovery against an interstate railway carrier for the death or injury of an employee while engaged in interstate commerce which may result from the negligence of any of the employees of such company. The court decided that an employee of an interstate railway carrier killed while carrying a sack of bolts or rivets to be used in repairing a bridge which was regularly used in both interstate and intrastate commerce, was employed in interstate commerce within the meaning of the act referred to, giving a right of recovery against the carrier for the death of an employee while so employed. The issue there did not in-
50 volve even remotely the question we are here considering.

In that case, however, the court notes a distinction which has a very important bearing upon the question here involved. Mr. Justice Van Deventer in the opinion makes this reservation:

"Of course we are not here concerned with the construction of tracks, bridges, engines or cars which have not become instrumentalities of such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such."

This reservation has a very special application to this case, for here the signal towers were not being repaired and had not yet become the instrumentalities of interstate commerce.

If the erection of such structures is construed to be engaging in interstate commerce and not doing business within the State in which they are erected then it follows that none of the great railway supply companies, nor those persons and corporations engaged in the construction of locomotives, engines, cars, the cutting of ties, the building of station houses, the construction of office buildings, and producing many other things ultimately intended to be instrumentalities of commerce, are doing business within the States in which such occupations are carried on. If such a doctrine be established then the defendant company is not doing intrastate business in the State of New York because it is engaged in the construction of instrumentalities intended to be used in interstate commerce. We believe the true doctrine to be that those engaged in manufacturing or producing instrumentalities of commerce are engaged in intrastate business in the State in which the work is done and subject to all the laws of the State governing local business transactions. After such instrumentalities have become instrumentalities of interstate commerce then different questions, not pertinent here, may arise.

There are other cases relied upon by the defendant's counsel in which there was only a single transaction where it was held, and it is established, that the foreign corporation may follow its goods into other States to which they have been transported in interstate commerce, and may there do incidental acts of installation so that the goods may be used for their designed purpose. No case, we think, however, can be found which will justify numerous or repeated transactions of this character, or even a single transaction which necessitates construction work of the character here involved. For instance, the construction of portions of a building in Dallas by a St. Louis construction company, is doing business in Texas.

St. Louis Metal Co. v. Beihlarz, 87 S. W. (Texas) 512.

51 One of the cases relied upon by the defendant is Leschen Rope Company v. Moser, 159 S. W. (Texas) 1018. This was a contract under which the foreign corporation sold the material for the construction of an aerial tramway to be erected across the Rio Grande River at a point about ninety miles from Marathon, Texas, to be used for carrying zinc ores from the mine in Mexico to a point in Texas. The provision of the contract, which is pertinent, reads thus:

"To facilitate the erection and make proper adjustment of the machinery we can furnish you with a thoroughly competent superintendent for eight dollars per day and hotel and traveling expenses, payable in United States currency, time and expense to be charged

from the time of leaving St. Louis and until his return to St. Louis; such charges and expenses to be paid us at the end of each week."

The court says, in construing this provision:

"No obligation rested upon Moser to accept or retain the services of this man, but it appears that he did accept such services, and even delegated to him the power to hire and discharge those who erected the tramway for Moser and were paid by Moser for their work. The contract did not provide for the sale and delivery of a tramway after its completion, nor did it call for the sale of a tramway delivered with an agreement to install the same, but it was merely proposed to furnish a competent superintendent in order to facilitate the erection of the machinery by Moser and make proper adjustment thereof. We do not think this incidental agreement can be given the effect of making the transaction one not involving interstate commerce. To so hold would mean that a corporation in another State would have to forego sales in such State of machinery to be erected in this State if the purchaser refused to buy, unless the corporation furnished a capable man to supervise the erection and adjustment of the machinery, or else it would have to secure a permit to do business in this State."

It will be noted that in the case at bar the General Railway Signal Company did provide for the construction of the signal towers, and made repeated agreements to install the same, whereas in the Moser case the agreement was to furnish a superintendent to facilitate the erection of the machinery by the purchaser. This superintendent was to be paid by the purchaser, all installation was done by Moser, the purchaser, and all the expenses thereof paid by him, whereas here the installation was done by the General Railway Signal Company, the foreign corporation, and all the expenses were borne by it,
and the contract called, (to use its own language) "for the
52 completion of the entire system and the turning over of the
same to the railway company as a finished job."

It would seem that the mere statement of these facts is conclusive of the proposition that the defendant company, during the many months it has taken to construct these signals, has been doing business in this State, and is, therefore, liable to the fine imposed for the violation of the statute referred to. If, however, any doubt may remain from the consideration of the facts and the cases referred to it seems that the case of Browning v. Waycross, decided April 6th, 1914, Lawyers' Co-operative Advance Sheets October Term, 1913, p. 579, removes that doubt conclusively. The facts of that case are that a St. Louis corporation, through its agent in Georgia, solicited orders and made sales of lightning rods, the price paid for the rods to the St. Louis corporation including the duty to erect them without further charge. The agent of the St. Louis corporation was fined for violating an ordinance of the City of Waycross imposing an occupation tax of $25.00 upon lightning rod agents or dealers engaged in putting up or erecting lightning rods within the corporate limits of the City of Waycross. It was claimed that the erection of the lightning rods was a mere incident of the sale, and constituted the carrying on of inter-

state commerce, which could not be taxed without violating the commerce clause of the Constitution. We cannot do better, we think, than to quote the language of Chief Justice White in affirming the judgment of the lower court imposing the fine:

"We are of the opinion that the court below was right in holding that the business of erecting lightning rods under the circumstances disclosed was within its regulating power of the state, and not the subject of interstate commerce, for the following reasons: (*a*) Because the affixing of lightning rods to houses was the carrying on of a business of a strictly local character, peculiarly within the exclusive control of state authority; (*b*) Because, besides, such business was wholly separate from interstate commerce, involving no question of the delivery of property shipped in interstate commerce, or of the right to complete an interstate commerce transaction, but concerned merely the doing of a local act after interstate commerce had completely terminated. It is true that it was shown that the contract under which the rods were shipped bound the seller, at his own expense, to attach the rods to the houses of the persons who ordered rods, but it was not within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to state control, into an interstate commerce business, protected by the commerce clause. It is manifest that if the right here asserted were recognized, or the power to accomplish by contract what is here claimed were to be upheld, all lines of demarcation between
53 national and state authority would become obliterated, since it would necessarily follow that every kind of form of material shipped from one state to the other, and intended to be used after delivery in the construction of buildings or in the making of improvements in any form, would or could be made interstate commerce."

The Chief Justice in this case adds:

"Of course we are not called upon here to consider how far interstate commerce might be held to continue to apply to an article shipped from one state to another, after delivery and up to and including the time when the article was put together or made operative in the place of destination in a case where, because of some intrinsic and peculiar quality or inherent complexity of the article, the making of such agreement was essential to the accomplishment of the interstate transaction. In saying this we are not unmindful of the fact that some suggestion is here made that the putting up of the lightning rods after delievery by the agent of the seller was so vital and so essential as to render it impossible to contract without an agreement to that effect,—a suggestion, however, which we deem it unnecessary to do more than mention in order to refute it."

And this principle is invoked by the defendant in this case to sustain the position that the erection of these railway signals simply constituted the completion of an interstate transaction. We believe, however, that this is to misunderstand and misconstrue the qualification referred to. In the first place, in the case at bar the defendant company was not selling an article of personal property to the

railway company. It made a contract to construct the signals in Virginia, and much of the work done in Virginia was in no degree complex, such as concrete work, digging ditches, connecting wires, the employment of unskilled labor and painting, such as an ordinary painter could do; and it is admitted that they can and do sell the signals to certain railway companies which do all the construction work for themselves, apparently finding no difficulty in securing competent electricians for the purpose, so there can be no inherent complexity about the construction of railway signals which cannot be overcome by those who desire to engage in such a business.

Upon the whole case we have no doubt whatever that the defendant has violated the Virginia statute referred to, and persists in such violation. Therefore we shall impose upon the company a fine of one thousand dollars, which is the amount of the fee which would have been required had the statute been obeyed.

Rhea and Wingfield, Commissioners, concur.

54 I, R. T. Wilson, Clerk, State Corporation Commission, do hereby certify that proper notice was given of the intention to apply for a transcript of the record in this case as the basis for appeal to the Supreme Court of Appeals of Virginia, pursuant to the provisions of Section 3457, Code of Virginia, 1904.

Given under my hand this 22nd day of January, 1915.

R. T. WILSON,
Clerk State Corporation Commission.

The Chairman of the State Corporation Commission hereby certifies to the Supreme Court of Appeals of Virginia that the foregoing contains and sets out all the facts and evidence upon which the action of the Commission in the said proceeding was based (except certain blue prints and photographs which were used as evidence and which are on file with the record, but not copied herein at the request of counsel), and which are essential to a proper decision of the appeal to be taken from such action, and is also a true transcript of the proceeding and orders of the Commission of such proceeding.

Witness the seal of the State Corporation Commission and the signature of the Chairman, attested by the Clerk, this 22d day of January, 1915, and in the one hundred and thirty-ninth year of the Commonwealth.

[SEAL.] ROBERT R. PRENTIS, *Chairman.*

Attest:

R. T. WILSON,
Clerk of the Commission.

A Copy—Teste:

H. STEWART JONES, *C. C.*

55 Cardwell, J., absent.

HARRISON, *J.*:

This is an appeal from a final order of the State Corporation Commission. In deciding the case the learned chairman of the Commission delivered the following opinion which fully and clearly states the facts of the case, and discusses the law applicable thereto:

"This is a proceeding instituted under section 1105 of the Code, charging the General Railway Signal Company with doing business within the State of Virginia without having complied with section 1104 of the Code, requiring every foreign corporation, before doing business in this State, to present to this Commission written powers of attorney, appointing some person residing in this State its agent upon whom process against the corporation may be served, two duly authenticated copies of its charter and a cretificate from the Auditor of Public Accounts showing the payment of the fee required by law of such foreign corporation.

"The defendant is a corporation of the State of New York, having an authorized capital of $5,000,000. Its principal
56 office and factory is at Rochester, N. Y., where it owns and operates a large manufacturing plant devoted to the manufacture of materials chiefly used in the construction of railway signals which it sells and constructs all over the world. It has a branch factory at Montreal, Canada, and maintains branch offices in New York city, Chicago, and San Francisco.

"By contract dated the fifth day of May, 1914, with the Southern Railway Company, the defendant agreed to furnish certain materials, supplies, machinery, devices and equipment, as well as all necessary labor, and to install, erect, and put in place certain signals and apparatus shown on the plans and described in the specifications, from Amherst to Whittles, Virginia, fifty-eight miles, and to 'complete the entire system and turn same over to the railway company as a finished job,' subject to inspection and acceptance, for $85,597. Similar contracts had been previously made and fully performed, one dated September 6, 1911, covering the lines of the Southern Railway in Virginia from Monroe to Montview, Virginia, thirteen miles, for $16,015, and one dated July 18, 1913, from Orange to Seminary, Virginia, seventy-six miles, for $112,428. The aggregate distance in this State covered by these contracts being 147 miles, and the total consideration being $214,040.

"The purpose of these signals is to promote safety of railway operation and they operate automatically.

"In order to construct these signals as required by the contract it was necessary to employ in this State labor, skilled and unskilled, to dig ditches in which conduits for the wires are placed, to construct concrete foundations, and to paint the completed structures. The completed structures are along the side of the railway track, about two miles apart, and are twenty-two or twenty-three feet high. In the language of the witness, Moffett: 'It is necessary to erect the signal mechanism, the masts supporting the mechanism, the houses for protecting the relays, reactors, re-actants and other

similar electrical devices protected from the weather, then the
57 transformers, high tension line arrestors and low tension line arrestors.' The completed structures are permanently attached to the freehold upon concrete bases.

"While counsel for the defendant insists that the main object of the transaction was to sell the materials which it manufactures in the State of New York, the contract and the letters leading up to the contract plainly show (unless the less includes the greater) that the main purposes expressed was to erect, install and complete the signal system in Virginia, and that the furnishing of the material was the necessary and preliminary incident of the contract.

"The fact that the contract with the railway company was signed outside of Virginia and also that certain signalmen and skilled employees were brought from New York to do a part of the work, is urged as an incidental reason for the defendant's contentions. This proposition, however, cannot be maintained, because not only the contract with the railway company but the incidental contracts made with these skilled employees were to be performed in Virginia, and, therefore, the contracts are governed by the laws of Virginia.

"London Assurance v. Companhia de Moagens Do Barriero, 167 U. S. 160, 42 L. Ed. 120; Andrews v. Pond, 38 U. S. 12, 10 L. Ed. 61; Bell v. Bruen, 42 U. S. 169, 11 L. Ed. 89; Bank of United States v. Daniel, 37 U. S. 12, 9 L. Ed. 997; Scudder v. Union National Bank, 91 U. S. 406, 23 L. Ed. 245; Graves v. Johnson, 156 Mass. 211, 15 L. R. A. 834.

"It is claimed for the defendant that the main purpose of the transaction on the part of the defendant company was the sale of its manufactured products, and the transaction is alleged to be similar to the ordinary sale of goods by a dealer in one State to a purchaser in another State, and the transportation of the goods so sold in interstate commerce to the purchaser. The case of Robbins v. Shelby County Taxing District, 120 U. S. 489, and similar cases, are relied upon to sustain that claim.

58 "Of course, we have no intention of questioning the authority of that case or of the cases following it, of which it is the prototype. The case at bar, however, cannot be brought within the rule there established. The facts of this case show that the object of the Southern Railway Company, the purchaser, was to secure the erection of permanent structures upon its right of way, and not the purchase of goods to be transported in interstate commerce. In this transaction the interstate commerce ended when the materials shipped from the factory in New York were delivered, not to the Southern Railway, but to the defendant in Virginia. They then became a part of the property located in Virginia still owned by the defendant, liable to State taxation and no longer protected by the commerce clause of the Constitution.

"It is well established that if such materials had been brought into this State for the purpose of storage that they would be liable to State taxes, and surely it follows that if after the transportation was ended, its owner changed their form from personal property

into real estate by building them into permanent structures, such a disposition of its property in this State is not interstate commerce. Coal sent by the owners in Pennsylvania to their agents in New Orleans, to be there sold for their account upon its arrival becomes part of the general mass of property in Louisiana, and is subject to taxation in common with all other property, and in precisely the same manner. Brown v. Houston, 114 U. S. 622, 29 L. Ed. 257. A license tax imposed upon meat packing houses for selling meat brought into the State in interstate commerce is not a burden upon interstate commerce. Armour Packing Co. v. Lacy, Treasurer, 200 U. S. 226, 50 L. Ed. 451. The same principle is announced in Kehrer v. Stewart, 197 U. S. 60, 49 L. Ed. 666.

"The American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. Ed. 538, is most instructive. The American Steel & Wire Company selected the City of Memphis as a distributing point for its
59 products, securing a local transfer company to take charge of its products when shipped to that point, assort them, store them in the transfer company's warehouses, and to make delivery therefrom in the original packages, to its customers, ninety per cent. thereof outside of Tennessee, either as expressly directed by it, or under general directions in favor of its recognized and approved customers, whose names were furnished to the transfer company. It was there held that when the goods reached the warehouses they had reached their destination and were liable to local taxation.

"In this case the warehouses were rented by the transfer company, and goods were delivered in the original packages; ninety per cent. of them ultimately went to jobbers who resided beyond the limits of the State of Tennessee, and the remaining ten per cent. were delivered to Memphis jobbers, all however in fulfillment of contracts previously made at Chicago. As we understand the principle definitely fixed by this case, the goods having come into the State of Tennessee as the property of the foreign merchant and at rest there, and the interstate journey having terminated, the goods became liable to taxation in that State, and the delivery of the goods after they thus reached their destination constituted doing business in the State in which such deliveries were made.

"In this case the court notes the distinction between imports in the legal sense, that is goods brought into the State from abroad, which may be there freely sold in original packages, and goods transported from one State to another in interstate commerce.

"The defendant here relies also upon the case of Pedersen v. Delaware, L. & W. Railroad Co., 229 U. S. 146, 57 L. Ed. 1125. This case arose under the Employers' Liability Act of April 22, 1908, giving the right of recovery against an interstate railway carrier for the death or injury of an employee while engaged in interstate commerce which may result from the negligence of any
60 of the employees of such company. The court decided that an employee of an interstate railway carrier killed while carrying a sack of bolts or rivets to be used in repairing a bridge which was regularly used in both interstate and intrastate commerce,

was employed in interstate commerce within the meaning of the act referred to, giving a right of recovery against the carrier for the death of an employee while so employed. The issue there did not involve even remotely the question we are here considering. In that case, however, the court notes a distinction which has a very important bearing upon the question here involved. Mr. Justice Van Deventer in the opinion makes this reservation: 'Of course, we are not here concerned with the construction of tracks, bridges, engines or cars which have not become instrumentalities of such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such.' This reservation has a very special application to this case, for here the signal towers were not being repaired and had not yet become the instrumentalities of interstate commerce.

"If the erection of such structures is construed to be engaging in interstate commerce and not doing business within the State in which they are erected, then it follows that none of the great railway supply companies, nor those persons and corporations engaged in the construction of locomotives, engines, cars, the cutting of ties, the building of station houses, the construction of office buildings, and producing many other things ultimately intended to be instrumentalities of commerce, are doing business within the States in which such occupations are carried on. If such a doctrine be established, then the defendant company is not doing intrastate business in the State of New York because it is engaged in the construction of instrumentalities intended to be used in interstate commerce. We believe th true doctrine to be that those engaged in manufacturing or
61 producing instrumentalities of commerce are engaged in intrastate business in the State in which the work is done and subject to all the laws of the State governing local business transactions. After such instrumentalities have become instrumentalities of interstate commerce then different questions, not pertinent here, may arise.

"There are other cases relied upon by the defendant's counsel in which there was only a single transaction where it was held, and it is established that the foreign corporation may follow its goods into other States to which they have been transported in interstate commerce, and may there do incidental acts of installation so that the goods may be used for their designed purpose. No case, we think, however, can be found which will justify numerous or repeated transactions of this character, or even a single transaction which necessitates construction work of the character here involved. For instance, the construction of portions of a building in Dallas by a St. Louis construction company, is doing business in Texas. St. Louis Metal Co. v. Beihlarz, 87 S. W. (Texas) 512.

"One of the cases relied upon by the defendant is Leschen Rope Company v. Moser, 159 S. W. (Texas) 1018. This was a contract under which the foreign corporation sold the material for the construction of an aerial tramway to be erected across the Rio Grande river at a point about ninety miles from Marathon, Texas, to be used for carrying zinc ores from the mine in Mexico to a point in Texas.

The provision of the contract, which is pertinent, reads thus: 'To facilitate the erection and make proper adjustment of the machinery we can furnish you with a thoroughly competent superintendent for eight dollars per day and hotel and traveling expenses, payable in United States currency, time and expense to be charged from the time of leaving St. Louis and until his return to St. Louis; such charges and expenses to be paid us at the end of each week.' The court says, in construing this provision: 'No obligation rested
62 upon Moser to accept or retain the services of this man, but it appears that he did accept such services, and even delegated to him the power to hire and discharge those who erected the tramway for Moser and were paid by Moser for their work. The contract did not provide for the sale and delivery of a tramway after its completion, nor did it call for the sale of a tramway delivered with an agreement to install the same, but it was merely proposed to furnish a competent superintendent in order to facilitate the erection of the machinery by Moser and make proper adjustment thereof. We do not think this incidental agreement can be given the effect of making the transaction one not involving interstate commerce. To so hold would mean that a corporation in another State would have to forego sales in such State of machinery to be erected in this State if the purchaser refused to buy, unless the corporation furnished a capable man to supervise the erection and adjustment of the machinery or else it would have to secure a permit to do business in this State.'

"It will be noted that in the case at bar the General Railway Signal Company did provide for the construction of the signal towers, and made repeated agreements to install the same, whereas in the Moser case the agreement was to furnish a superintendent to facilitate the erection of the machinery by the purchaser. This superintendent was to be paid by the purchaser, all installation was done by Moser, the purchaser, and all the expenses thereof paid by him, whereas here the installation was done by the General Railway Signal Company, the foreign corporation, and all the expenses were borne by it, and the contract called (to use its own language) 'for the completion of the entire system and the turning over of the same to the railway company as a finished job.'

"It would seem that the mere statement of these facts is conclusive of the proposition that the defendant company, during the many months it has taken to construct these signals, has been doing
63 business in this State, and is, therefore, liable to the fine imposed for the violation of the statute referred to. If, however, any doubt may remain from the consideration of the facts and the cases referred to, it seems that the case of Browning v. Waycross, decided April 6, 1914, 233 U. S. 16, removes that doubt conclusively. The facts of that case are that a St. Louis corporation, through its agent in Georgia, solicited orders and made sales of lightning rods, the price paid for the rods to the St. Louis corporation including the duty to erect them without further charge. The agent of the St. Louis corporation was fined for violating an ordinance of the city of Waycross imposing an occupation tax of $25.00 upon

lightning rod agents or dealers engaged in putting up or erecting lightning rods within the corporate limits of the city of Waycross. It was claimed that the erection of the lightning rods was a mere incident of the sale, and constituted the carrying on of interstate commerce, which could not be taxed without violating the commerce clause of the Constitution. We cannot do better, we think, than to quote the language of Chief Justice White in affirming the judgment of the lower court imposing the fine: 'We are of opinion that the court below was right in holding that the business of erecting lightning rods under the circumstances disclosed was within the regulating power of the State, and not the subject of interstate commerce, for the following reasons: (*a*) Because the affixing of lightning rods to houses was the carrying on of a business of a strictly local character, peculiarly within the exclusive control of State authority; (*b*) Because, besides, such business was wholly separate from interstate commerce, involving no question of the delivery of property shipped in intrastate commerce, or of the right to complete an interstate commerce transaction, but concerned merely the doing of a local act after interstate commerce had completely termin-ted. It is true that it was shown that the contract under which the rods were shipped bound the seller, at his
64 own expense, to attach the rods to the houses of the persons who ordered rods, but it was not within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to State control, into an interstate commerce business, protected by the commerce clause. It is manifest that if the right here asserted were recognized, or the power to accomplish by contract what is here claimed were to be upheld, all lines of demarcation between national and State authority would become obliterated, since it would necessarily follow that every kind or form of material shipped from one State to the other, and intended to be used after delivery in the construction of buildings or in the making of improvements in any form, would or could be made interstate commerce.'

"The Chief Justice in this case adds: 'Of course we are not called upon here to consider how far interstate commerce might be held to continue to apply to an article shipped from one State to another, after delivery and up to and including the time when the article was put together or made operative in the place of destination in a case where, because of some intrinsic and peculiar quality or inherent complexity of the article, the making of such agreement was essential to the accomplishment of the interstate transaction. In saying this we are not unmindful of the fact that some suggestion is here made that the putting up of the lighting rods after delivery by the agent of the seller was so vital and so essential as to render it impossible to contract without an agreement to that effect—a suggestion, however, which we deem it unnecessary to do more than mention in order to refute it.'

"And this principle is invoked by the defendant in this case to sustain the position that the erection of these railway signals simply constituted the completion of an interstate transaction. We believe

however, that this is to misunderstand and misconstrue the qualification referred to. In the first place, in the case at bar the defendant company was not selling an article of personal property to the railway company. It made a contract to construct the
65 signals in Virginia, and much of the work done in Virginia was in no degree complex, such as concrete work, digging ditches, connecting wires, the employment of unskilled labor and painting, such as an ordinary painter could do; and it is admitted that they can and do sell the signals to certain railway companies which do all the construction work for themselves, apparently finding no difficulty in securing competent electricians for the purpose, so there can be no inherent complexity about the construction of railway signals which cannot be overcome by those who desire to engage in such a business.

"Upon the whole case we have no doubt whatever that the defendant has violated the Virginia statute referred to, and persists in such violation. Therefore, we shall impose upon the company a fine of one thousand dollars, which is the amount of the fee which would have been required had the statute been obeyed."

This opinion, which we adopt as the opinion of this court, fully and satisfactorily expresses our views of the case considered by the Commission.

The last contention of the appellant, which does not appear to have been made before the Corporation Commission, is that the imposition of a tax upon the defendant's entire capital stock as a condition of its doing an intrastate business is a burden upon the interstate commerce done by said corporation, and, therefore, invalid under the Federal Constitution. In support of this contention, which we think is without merit, the appellant relies upon cases involving the right of the State to impose a license tax upon public service corporations engaged in both interstate and intrastate commerce within the State, which announce the well settled doctrine that a State cannot lay a tax upon interstate commerce in any form.

These cases have no application to the present case. Here the defendant is a commercial corporation carrying on a purely local and domestic business quite separate from their interstate commerce transactions. Under such circumstances the State has the
66 right to prescribe the conditions upon which such a corporation may do its intrastate business provided it lays no burden upon its interstate business. This question is disposed of by the case of Baltic Mining Co. v. Massachusetts, 231 U. S. 68, which holds that "where a foreign corporation carries on a purely local business separate from its interstate business, the State may impose an excise tax upon it for the privilege of carrying on such business and measure the same by the authorized capital of the corporation."

There is no error in the order appealed from, and it is affirmed.

Affirmed.

67 VIRGINIA:

In the Supreme Court of Appeals, Held at the Library Building in the City of Richmond, on Thursday, the 13th Day of January, 1916.

GENERAL RAILWAY SIGNAL COMPANY, Appellant,
against
COMMONWEALTH OF VIRGINIA, Appellee.

Upon an Appeal from an Order Entered by the State Corporation Commission on the 17th Day of December, 1914.

This day came again as well the appellant, by counsel, as the Attorney General on behalf of the Commonwealth, and the Court having maturely considered the transcript of the record of the order aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record that there is no error in the order appealed from. It is therefore adjudged, ordered and decreed that the same be affirmed, and that the appellant pay to the Commonwealth damages according to law, and also her costs by her expended about her defence herein.

Which is ordered to be forthwith certified to the said State Corporation Commission.

A copy,
Teste:

H. STEWART JONES, C. C.

68 *Authentication of Record.*

SUPREME COURT OF APPEALS,
State of Virginia, ss:

I. H. Stewart Jones, Clerk of said Court, do hereby certify that the foregoing pages numbered from 1 to 55, inclusive, are a true, full and complete transcript of the record and proceedings, in the case of General Railway Signal Company, Appellant, vs. Commonwealth of Virginia, at the relation of the State Corporation Commission, Appellee, and also of the opinion of the Court rendered therein, as the same now appear on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Richmond, Virginia, this 15th day of May, 1916.

H. STEWART JONES,
Clerk Supreme Court of Appeals of the State of Virginia, at Richmond, Va.

I, James Keith, one of the Judges and the President of the Supreme Court of Appeals of the State of Virginia, do hereby certify that the foregoing is the true and genuine signature of H. Stewart

Jones, Clerk of the said Court, and that the foregoing attestation made by him is in due form.

Witness my hand and seal this the 15th day of May, 1916.

JAMES KEITH,
President Supreme Court of Appeals of the State of Virginia.

I, H. Stewart Jones, Clerk of said Court, do hereby certify that the Honorable James Keith, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, President of the Supreme Court of Appeals of the State of Virginia, duly commissioned and qualified.

Witness my hand and the seal of the said Court, this 15 day of May, 1916.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

H. STEWART JONES,
Clerk Supreme Court of Appeals of the State of Virginia, at Richmond, Virginia.

69 In the Supreme Court of Appeals of Virginia.

GENERAL RAILWAY SIGNAL COMPANY
vs.
COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION.

To the Honorable Edward D. White, Chief Justice of the United States, to the Other Justices of the Supreme Court of the United States, to the Honorable the Supreme Court of the United States, and to the President of the Supreme Court of Appeals of Virginia:

The petition of General Railway Signal Company, a corporation of the State of New York, respectfully shows:

I. Heretofore and on or about August 24, 1914, a rule was awarded by the State Corporation Commission of the Commonwealth of Virginia against the General Railway Signal Company as follows:

"A rule is hereby awarded against General Railway Signal Company, a corporation chartered under the laws of some other jurisdiction than of the Commonwealth of Virginia, and designated as a foreign corporation, returnable at the court room of the State Corporation Commission, in the Capitol Building in the City of Richmond, Virginia, at ten o'clock A. M., on Wednesday, the sixteenth day of September, 1914, requiring it to show cause, if any it can, why it should not be fined under section 1105 of the Code of Virginia, as amended, for transacting business in this State without first obtaining the certificate of authority provided for in section 1104 of the Code of Virginia, as amended."

A summons having issued thereupon the defendant voluntarily ac-

cepted service and filed its answer on the return day. The defendant's answer alleged that it was a stock corporation duly
70 organized and existing under and by virtue of the laws of the State of New York, having its office and principal place of business in the Town of Gates, County of Monroe, State aforesaid, where it owned and operated a large manufacturing plant devoted to the manufacture of railway signals; that its sole business was the manufacture and sale of such signals and the apparatus incident and necessary to the operation thereof; that it had at no time had or maintained an office in the State of Virginia; that it had heretofore entered into a contract with the Southern Railway Company for the sale to it of railway signals to be operated on certain of its lines in Virginia, North Carolina, South Caroline and Georgia; that said contract was made outside the State of Virginia; that the Southern Railway Company was an interstate railroad and its lines covered by said contract were interstate lines; that pursuant to the terms of said contract the defendant manufactured and delivered on the lines of said Southern Railway Company and had installed and was still engaged in installing said railway signals in Virginia, North Carolina, South Carolina and Georgia; that such installation had been and was conducted under the supervision of expert engineers and other trained employees of the defendant sent from its office in the State of New York; that such installation was necessary to effectuate said contract entered into by the defendant and the transaction contemplated thereby, namely, the sale to the Southern Railway Company of railway signals and a system thereof, because of the peculiar qualities and inherent complexity of the railway signals manufactured by the defendant; that the railway signals manufactured and sold by the defendant were valueless and useless until and unless
71 installed and made operative by and under the supervision of trained employees of the defendant, no other persons possessing the requisite knowledge of the methods of the defendant; that from the nature of the railway signals manufactured by the defendant they could not be sold as finished and complete unless and until insured; that none of the acts performed by the defendant in the Commonwealth of Virginia or elsewhere constituted doing or transacting business in the Commonwealth of Virginia; and that none of the statutes of Virginia relating to foreign corporations applied to any of the acts of the defendant, but that if so construed or intended, they were to such extent in conflict with the Constitution of the United States and, therefore, null and void.

II. Subsequently the issues raised by said pleadings came on for trial on October 6, 1914, before State Corporation Commissioners R. R. Prentis and William F. Rhea at a hearing of the State Corporation Commission of the Commonwealth of Virginia at its Court Room in the Capitol Building at Richmond, Virginia. Witnesses were sworn and testified on behalf of the defendant and on behalf of the complainant and the contract between the defendant and the Southern Railway Company and other papers were introduced in evidence. On December 7, 1914, the attorneys for the defendant

submitted a brief on its behalf in which the defendant contended that it was not doing business in Virginia, that it was engaged in interstate commerce in installing its signals, and that it was not subject to regulation by the statutes of Virginia. On December 17, 1914, the State Corporation Commission rendered its decision that the defendant had violated section 1104 of the Code of Virginia, as amended, by doing business in the State without
72 first obtaining the certificate of authority therefor required by law, and ordered and adjudged that the General Railway Signal Company should render unto the Commonwealth of Virginia a fine of $1,000. At the same time the Commission filed an opinion by Commissioner Prentis holding that the defendant was doing business in Virginia and was not engaged merely in interstate commerce within the view of the statutes of Virginia, consequently violating them by its failure to comply with them.

III. Thereupon your petitioner duly appealed from said order and judgment to the Supreme Court of Appeals of Virginia, alleging in its petition for the grant of an appeal that the action of the State Corporation Commission was erroneous for reasons, in part, that your petitioner was a stock corporation of the State of New York engaged therein in the manufacture and interstate sale of railway signals, and in the conduct of its interstate business had from time to time entered into contracts with the Southern Railway Company for the sale to it of railway signals and their installation on the lines of the Southern Railway Company in Virginia and other states; that your petitioner had entered the State of Virginia solely for the purposes of its interstate commerce and had never done and was not then doing business in the State of Virginia within the meaning of the statutes of Virginia relating to foreign corporations; that assuming that the statutes of Virginia relating to foreign corporations be construed to apply to any acts of your petitioner, on the ground that they constituted intrastate commerce or on any other ground, such statutes were repugnant to the Constitution of the United States and in particular
73 to section 8 of Article I thereof, and to the Fifth Amendment and to section 1 of the Fourteenth Amendment thereto, and were, therefore, invalid. Said appeal duly came on for argument before the Supreme Court of Appeals of Virginia and your petitioner, through its counsel, duly argued in accordance with its brief filed with the court that said judgment of the State Corporation Commission should be reversed and said fine set aside for the reasons that the defendant was not doing business in Virginia; that the sale of defendant's railway signals to the Southern Railway Company, including their installation upon its railroad, was a transaction of interstate commerce and not subject to regulation by the State; that in the installation alone of its signals upon the Southern Railway the defendant was engaged in interstate commerce and not subject to regulation by the State; and that the imposition of a tax upon the defendant's entire capital stock as a condition of its doing intrastate business in connection with its interstate business was repugnant to the federal Constitution.

IV. Thereafter and on or about January 13, 1916, judgment was entered in the office of the clerk of said Supreme Court of Appeals of Virginia, which affirmed said judgment and order of the State Corporation Commission and directed that the appellant pay to the Commonwealth of Virginia damages according to law and costs of $22.59. At the same time the judgment was ordered certified to the State Corporation Commission. The Supreme Court of Appeals in its opinion adopted the opinion of the State Corporation Commission and denied validity to each of the contentions of the defendant. The Supreme Court of Appeals of Virginia is the highest court of the State of Virginia.

74 V. The undisputed facts in evidence show, in addition to those already recited, that the defendant had an authorized capital stock of $2,000,000 of preferred stock and $3,000,000 of common stock; that its sole business was the manufacture and sale of railway signals and the apparatus incident thereto, and its profit accrued from the sale of such products; that it sold them all over the world, usually to railways, and had a branch factory at Montreal, Canada, and maintained branch offices in New York City, Chicago and San Francisco, but at no time had an office in the State of Virginia; that the railway signals manufactured by the defendant, particularly those of the modern type, were extremely complex and intricate and required installation by specially trained signal engineers; that the purpose of railway signals was to safeguard life and property and to facilitate the movements of trains; that if the signals were not installed with extreme care and precision, they were dangerous and worse than useless; that some railroads had signal corps which were competent to put together and install modern railway signals, but other railroads lacked such an organization and in that case the signal companies were themselves obliged to install the signals in order to effectuate their sales; that the Southern Railway Company operated lines of railroad in Virginia, North Carolina, South Carolina, Georgia, Tennessee and other states; that it never had an adequate signal organization; that in the spring of 1914 the defendant entered into negotiations for the sale of signals to the Southern Railway Company between Amherst and Whittles, Virginia, and between Howell and Austell and New Holland, Georgia, for the sum of $189,656.00;

75 that the defendant had recently sold the Railway Company a system for use between Knoxville and Morristown, Tennessee, which was referred to in the correspondence in evidence; that subsequently separate contracts were executed, that concerning Virginia being in evidence; that on July 8, 1913, the defendant had made a similar contract with the Railway Company for a sale and installation between Orange and Seminary, Virginia, and there had been previous sales to it in Virginia; that the signals sold in Virginia were of the most modern direct or alternating current block signal type, with which very few railroads were familiar; that because of the Southern Railway Company's lack of a sufficient signal organization the defendant had been obliged to install such signals as it sold the Southern Railway

Company in order to effect the sale; that in general the procedure was to ship the signals and accompanying apparatus, after manufacture at the defendant's plant in Rochester, to the lines of the Southern Railway Company, where they were taken in charge by trained engineers and other employees of the defendant, who put them together and installed them along the lines of the purchaser; that the proportion of the contract assigned to cover expense of installation was between eight and ten per cent; that to assist in the installation local labor was employed to some extent, usually the unskilled laborers employed locally being less in number than the permanent specially trained employees of the defendant who supervised the installation; that the payrolls were sent to Rochester and the money forwarded from there; that no materials were purchased in the State of Virginia, except possibly a roll of tape for which there might be urgent need; that in the progress of the installation it was necessary to dig shallow trenches along the
76 railroad track, roughly not over sixteen hundred feet long to one hundred miles of track, and to erect iron standards bearing the semaphore arms and other devices; that the Railway Company furnished and erected the necessary wooden poles; that from the nature of the signals they could not be put together in complete form before shipment; that the exhibits gave a good idea of the nature of the signals manufactured by the defendant and graphically illustrated the inherent necessity of their installation by the manufacturer or some one who had the same special knowledge; and that the statutes of Virginia alleged to be applicable to the situation of the defendant were as follows:

"Sec. 1104. Every incorporated company doing business in this State shall have an office in the State, at which all claims against the company due residents of the State may be audited, settled and paid. Every such company incorporated under a jurisdiction beyond the limits of this State (and hereinafter designated as a foreign corporation) shall, before doing business in this State, present to the State Corporation Commission (*a*) a written power of attorney executed in duplicate, appointing some person residing in this State its agent, upon whom all legal process against the corporation may be served, and who shall be authorized to enter an appearance in its behalf; (*b*) two duly authenticated copies of the charter of the corporation; and (*c*) a certificate of the Auditor of Public Accounts, showing the payment into the treasury of the fee required by law to be paid by such corporation, and shall obtain from said Corporation Commission a certificate of authority to transact business in the State * * *."

"Sec. 1105. If any foreign corporation shall transact business in this State without first obtaining such certificate of authority provided for in the preceding section, it shall be fined not less than ten dollars nor more than one thousand dollars, such fine to be imposed by the State Corporation Commission, whose duty it shall be to see that provisions of the preceding section are complied with * * *."

"Sec. 38*a*. Every foreign corporation, when it obtains from the State Corporation Commission a certificate of authority to do busi-

ness in this State, shall pay an entrance fee into the treasury of Virginia to be ascertained and fixed as follows:

For a company whose maximum capital stock is fifty thousand dollars, or less, thirty dollars; for a company whose capital stock is over fifty thousand dollars, and not to exceed one million dollars, sixty cents for each one thousand dollars or fraction thereof; over one million dollars and not to exceed ten million dollars, one thousand dollars * * *."

77 V. Both before the State Corporation Commission and the Supreme Court of Appeals your petitioner duly argued and insisted that it was not doing business in the Commonwealth of Virginia, and that its business was protected from State interference by the commerce clause and other clauses of the federal Constitution. Said contentions of your petitioner were denied in both said courts. Said decisions of said courts and of each of them were in favor of the validity of statutes of the Commonwealth of Virginia which were drawn in question by your petitioner on the ground of their being repugnant to the Constitution of the United States and denied to your petitioner a right, title, privilege and immunity held by your petitioner under the Constitution and statutes of the United States.

Wherefore your petitioner prays that a writ of error may issue and that it may be allowed to bring up for review before the Supreme Court of the United States the said order and judgment of said Supreme Court of Appeals of the Commonwealth of Virginia, and that your petitioner may have such other and further relief in the premises as may be just, and your petitioner will ever pray, etc.

GENERAL RAILWAY SIGNAL COMPANY,
By G. D. MORGAN, *Vice-President.*

McGUIRE & WOOD,
Attorneys for Petitioner, 910 *German Insurance Bldg., Rochester, N. Y.*

STATE OF NEW YORK,
County of Monroe, City of Rochester, ss:

78 George D. Morgan, being duly sworn, deposes and says: I am the vice-president of the foregoing petitioner; the foregoing petition is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe the same to be true.

GEORGE D. MORGAN.

Sworn to before me May 5, 1916.

[Seal of E. E. Pink, Notary Public, Monroe County, N. Y.]

E. E. PINK,
Notary Public.

Read on application for writ of error May 12, 1916, and writ of error allowed upon execution of bond in penalty of two thousand dollars.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

JAMES KEITH,
President of the Supreme Court of Appeals of Virginia.

79 [Endorsed:] (Original.) In the Supreme Court of Appeals of Virginia. General Railway Signal Company, vs. Commonwealth of Virginia, at the relation of the State Corporation Commission. Petition. McGuire & Wood, Attorneys for General Railway Signal Company, 910 German Insurance Building, Rochester, N. Y.

80 In the Supreme Court of Appeals of Virginia.

GENERAL RAILWAY SIGNAL COMPANY
vs.
COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION.

And now comes General Railway Signal Company, the plaintiff in error, and makes and files this its assignment of errors:

I. The State Corporation Commission of the Commonwealth of Virginia erred in holding that the General Railway Signal Company had violated section 1104 of the Code of Virginia, as amended, and in fining it for such alleged violation, for the reason that the General Railway Signal Company was not doing business in Virginia.

II. The Supreme Court of Appeals of the Commonwealth of Virginia erred in affirming the judgment and order of the State Corporation Commission of the Commonwealth of Virginia, for the reason that the General Railway Signal Company was not doing business in Virginia.

III. The State Corporation Commission of the Commonwealth of Virginia erred in holding that the General Railway Signal Company had violated section 1104 of the Code of Virginia, as amended, and in fining it for such alleged violation, for the reason that the
81 sale of the General Railway Signal Company's railway signals to the Southern Railway Company, including their installation upon its railroad, was a transaction of interstate commerce and protected by the commerce clause of the federal Constitution.

IV. The Supreme Court of Appeals of the Commonwealth of Virginia erred in affirming the judgment and order of the State Corporation Commission of the Commonwealth of Virginia, for the reason that the sale of the General Railway Signal Company's railway signals to the Southern Railway Company, including their in-

stallation upon its railroad, was a transaction of interstate commerce and protected by the commerce clause of the federal Constitution.

V. The State Corporation Commission of the Commonwealth of Virginia erred in holding that the General Railway Signal Company had violated section 1104 of the Code of Virginia, as amended, and in fining it for such alleged violation, for the reason that in the installation alone of its signals upon the Southern Railway the General Railway Signal Company was engaged in interstate commerce, which was protected by the federal Constitution.

VI. The Supreme Court of Appeals of the Commonwealth of Virginia erred in affirming the judgment and order of the State Corporation Commission of the Commonwealth of Virginia, for the reason that in the installation alone of its signals upon the Southern Railway the General Railway Signal Company was engaged in interstate commerce, which was protected by the federal Constitution.

VII. The State Corporation Commission of the Commonwealth of Virginia erred in holding that the General Railway Signal
82 Company had violated section 1104 of the Code of Virginia, as amended, and in fining it for such alleged violation, for the reason that the imposition of a tax by the Virginia statutes upon the General Railway Signal Company's entire capital stock as a condition of its doing intrastate business in connection with its interstate business was repugnant to the federal Constitution.

VIII. The Supreme Court of Appeals of the Commonwealth of Virginia erred in affirming the judgment and order of the State Corporation Commission of the Commonwealth of Virginia, for the reason that the imposition of a tax by the Virginia statutes upon the General Railway Signal Company's entire capital stock as a condition of its doing intrastate business in connection with its interstate business was repugnant to the federal Consitution.

IX. The Supreme Court of Appeals of the Commonwealth of Virginia erred in refusing to reverse and set aside the judgment and order of the State Corporation Commission hereinbefore referred to.

McGUIRE & WOOD,
Attorneys for the General Railway Signal Company, 910 German Insurance Bldg., Rochester, New York.

Read on application for writ of error May 12, 1916.
JAMES KEITH,
President of the Supreme Court of Appeals of the Commonwealth of Virginia.

83 [Endorsed:] (Original.) In the Supreme Court of Appeals of Virginia. General Railway Signal Company, vs. Commonwealth of Virginia, at the relation of the State Corporation Commission. Assignment of Errors. McGuire & Wood, Attorneys for General Railway Signal Company, 910 German Insurance Building, Rochester, N. Y.

84 In the Supreme Court of Appeals of Virginia.

GENERAL RAILWAY SIGNAL COMPANY
vs.
COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION.

To the Honorable the Supreme Court of the United States:

And now comes General Railway Signal Company, the plaintiff in error, and prays for a reversal of the judgment and order of the Supreme Court of Appeals of the Commonwealth of Virginia in the proceeding brought by the Commonwealth of Virginia, at the relation of the State Corporation Commission, complainant, against General Railway Signal Company, defendant, which judgment and order were entered in the office of the clerk of the Supreme Court of Appeals of Virginia on or about January 13, 1916; and it also prays for a reversal of the judgment and order in said proceeding of the State Corporation Commission of the Commonwealth of Virginia entered in the office of the clerk of said State Corporation Commission on or about December 17, 1914.

McGUIRE & WOOD,
Attorneys for the General Railway Signal Company,
910 *German Insurance Bldg., Rochester, New York.*

85 Read on application for writ of error May 12, 1916.

JAMES KEITH,
President of the Supreme Court of Appeals of Virginia.

[Endorsed:] (Original). In the Supreme Court of Ap-
86 peals of Virginia. General Railway Signal Company, vs. Commonwealth of Virginia, at the relation of the State Corporation Commission. Prayer for Reversal. McGuire & Wood, Attorneys for General Railway Signal Company, 910 German Insurance Building, Rochester, N. Y.

87 Know all Men by These Presents, That J. O. Sale, of Richmond, Virginia, as Principal, and American Surety Company of New York, as Surety, are held and firmly bound unto the Commonwealth of Virginia in the sum of Two Thousand Dollars ($2,000.00), to the payment whereof well and truly to be made, we bind ourselves, our heirs, executors and administrators by these presents. Witness our hands and seals this 13th day of May, 1916.

We hereby waive our homestead exemption as to this obligation and also waive any claim or right to discharge any liability arising under this bond in any currency, funds, or counter-claims, other than legal tender currency of the United States.

The Condition of the Above Obligation is Such, That whereas, the General Railway Signal Company has been allowed an appeal from the Supreme Court of Appeals of Virginia to the Supreme

Court of the United States from a certain order and ruling of the Supreme Court of Appeals of Virginia made on the 13th day of January, 1916, in the proceedings styled Commonwealth of Virginia at the relation of the State Corporation Commission against General Railway Signal Company upon the said General Railway Signal Company, or some one for it, entering into a bond in the penalty to be affixed by the said Supreme Court of Appeals of Virginia, with sufficient surety to be approved by the said Court of the President thereof, and the President of said Court having approved this bond now to be executed.

88 Now, if the said General Railway Signal Company shall pay all such specific damages, costs and fees, which may be awarded against it or incurred by it, and shall pay and satisfy any judgment of the Supreme Court of the United States pronounced against it on the said appeal, then this obligation shall be void, otherwise, to remain in full force and virtue.

J. O. SALE. [SEAL.]

[Seal American Surety Co. of New York.]

AMERICAN SURETY COMPANY OF NEW YORK,
By GEO. N. SKIPWITH, *Agent.* [SEAL.]

Stamp.

Approved May 13, 1916.

JAMES KEITH,
President Supreme Court of Appeals.

89 In the Supreme Court of Appeals of Virginia.

GENERAL RAILWAY SIGNAL COMPANY
vs.
COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of Appeals of the Commonwealth of Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Supreme Court of Appeals of the Commonwealth of Virginia before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in said suit, between the Commonwealth of Virginia, at the relation of the State Corporation Commission, complainant, and the General Railway Signal Company, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority exercised under,

said State on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of their validity, or wherein any title, right, privilege
90 or immunity was claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission or authority, a manifest error hath happened to the great damage of the said defendant General Railway Signal Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 10th day of June next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the said Supreme Court, the 13th day of May, in the year of our Lord one thousand nine hundred and sixteen.

[Seal United States District Court, Eastern District of Virginia.]

JOSEPH P. BRADY,
Clerk of the District Court of the United States for the Eastern District of Virginia.

Allowed by

JAMES KEITH,
President of the Supreme Court of Appeals of Virginia.

91 [Endorsed] (Original.) In the Supreme Court of Appeals of Virginia. General Railway Signal Company, vs. Commonwealth of Virginia, at the relation of the State Corporation Commission. Writ of Error. Writ of Error Received & Filed May 13, 1916. McGuire & Wood, Attorneys for General Railway Signal Company, 910 German Insurance Building, Rochester, N. Y.

92 In the Supreme Court of Appeals of Virginia.

GENERAL RAILWAY SIGNAL COMPANY
vs.
COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION.

UNITED STATES OF AMERICA, *ss:*

To the Commonwealth of Virginia at the Relation of the State Corporation Commission, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty days from the date hereof pursuant to a writ of error filed in the clerk's office of the Supreme Court of Appeals of the Commonwealth of Virginia at Richmond, Virginia, wherein the General Railway Signal Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment and order rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable James Keith, President of the Supreme Court of Appeals of the Commonwealth of Virginia, this 12th day of May, in the year of our Lord one thousand nine hundred and sixteen.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

JAMES KEITH,
President of the Supreme Court of Appeals of the Commonwealth of Virginia.

93 [Endorsed:] (Original.) In the Supreme Court of Appeals of Virginia. General Railway Signal Company, vs. Commonwealth of Virginia, at the Relation of the State Corporation Commission. Citation. McGurie & Wood, Attorneys for General Railway Signal Company, 910 German Insurance Building, Rochester, N. Y. Due personal service of a copy of the within is hereby admitted this 15th day of May, 1916. Leslie C. Garnett, Assistant Att'y General Commonwealth of Virginia.

Endorsed on cover: File No. 25,321. Virginia Supreme Court of Appeals. Term No. 1038. General Railway Signal Company, plaintiff in error, vs. Commonwealth of Virginia at the relation of the State Corporation Commission. Filed May 29th, 1916. File No. 25,321.

BRIEF FOR THE PLAINTIFF IN ERROR.

Office Supreme Court, U. S.
FILED
DEC 26 1917
JAMES D. MAHER
CLERK.

SUPREME COURT

OF THE UNITED STATES

October Term, 1916. No. 499 177

GENERAL RAILWAY SIGNAL COMPANY,
Plaintiff in error,

vs.

COMMONWEALTH OF VIRGINIA, at the relation of the State Corporation Commission,
Defendant in error.

In error to the Supreme Court of Appeals of the State of Virginia.

McGUIRE & WOOD,
Attorneys for the plaintiff in error,
910 Insurance Building,
Rochester, New York.

E. R. ANDREWS PRINTING CO.
ROCHESTER, N. Y.
1917.

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SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1916

NO. 499

GENERAL RAILWAY SIGNAL COMPANY,
Plaintiff in error,

vs.

COMMONWEALTH OF VIRGINIA, AT THE RELATION OF THE STATE CORPORATION COMMISSION,
Defendant in error.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

STATEMENT OF THE CASE

This comes up on writ of error to the Supreme Court of Appeals of the State of Virginia, which affirmed a final order of the State Corporation Commission fin-

ing the General Railway Signal Company $1,000 and costs for an alleged violation of section 1104 of the Code of Virginia. A rule was awarded against the plaintiff in error returnable before the State Corporation Commission at Richmond on September 16, 1914, requiring it to show cause why it should not be fined under section 1105 of the Code of Virginia for violating section 1104 by transacting business in the State without first obtaining the certificate of authority required by the statute. A summons having thereupon issued, the defendant voluntarily accepted service and filed its answer on the return day. The defense was that the defendant was not doing business in Virginia and that its business was protected from State burdens by the federal Constitution. A hearing was had before the State Corporation Commission on October 6, 1914, at which evidence was introduced on behalf of the Commonwealth and on behalf of the defendant. Thereafter the Commission filed a decision finding that the defendant had violated the Virginia statute, upon which its judgment and order was entered December 17, 1914. The defendant appealed to the Supreme Court of Appeals of Virginia, where on January 13, 1916, the order of the State Corporation Commission was affirmed. On May 12, 1916, a writ of error was allowed by the President of the Virginia Supreme Court of Appeals.

The facts are undisputed.

The defendant is a stock corporation of the State of New York (p. 6), having an authorized capital of two million dollars of preferred stock and three million dollars of common stock (p. 19). It has its office and principal place of business in the County of Monroe in the State of New York, where it owns and operates a large manufacturing plant devoted to the manufacture of railway signals (p. 8). Its sole business is the manu-

facture and sale of such signals and the apparatus incident thereto (p. 6), and its profit accrues from the sale of such products (p. 13). It sells them all over the world, usually to railways (p. 6). It has a branch factory at Montreal, Canada, and maintains branch offices in New York City, Chicago and San Francisco. It has at no time had an office in the State of Virginia (p. 8).

The railway signals manufactured by the defendant, particularly those of the modern type, are extremely complex and intricate and require installation by specially trained signal engineers (p. 7). The purpose of railway signals is to safeguard life and property and to facilitate the movement of trains. If, therefore, the signals are not installed with extreme care and precision they are dangerous and worse than useless (p. 7). Very few railroads have signal corps which are competent to put together and install modern direct or alternating current railway signals (p. 38). Most railroads lack such an organization and in their case the signal companies are themselves obliged to install the signals in order to effectuate their sale (pp. 7, 12).

The Southern Railway Company operates lines of railroad in Virginia, North Carolina, South Carolina, Georgia, Tennessee and other States (p. 11). It has never had an adequate signal organization (p. 12). In the spring of 1914 the defendant entered into negotiations for the sale of signals to the Southern Railway Company between Amherst and Whittles, Virginia, and between Howell and Austell and New Holland and Atlanta, Georgia, for the sum of $189,656 (p. 8). The defendant had recently sold the Railway Company a system for use between Knoxville and Morristown, Tennessee, which was referred to in the correspondence. (Exhibit 1, p. 24.) Subsequently separate contracts

were executed, that concerning Virginia being in evidence as Exhibit 2 (p. 28). On July 8, 1913, the defendant had made a similar contract with the Railway Company for a sale and installation between Orange and Seminary, Virginia, and there had been previous sales to it in Virginia (p. 10). The signals sold in Virgina were of the most modern direct or alternating current block signal type. Because of the Southern Railway Company's lack of a sufficient signal organization the defendant was obliged to install such signals as it sold the Southern Railway Company in order to effect the sale (p. 12).

In general the procedure was to ship the signals and accompanying apparatus, after manufacture at the defendant's plant in Rochester, to the lines of the Southern Railway Company, where they were taken in charge by trained engineers and other employees of the defendant, who put them together and installed them along the lines of the purchaser. *The proportion of the contract price assigned to cover expense of installation was between eight and ten per cent* (p. 11). To assist in the installation local labor was employed to some extent, usually the unskilled laborers employed locally being less in number than the permanent specially trained employees of the defendant who supervised the installation (p. 11). The pay rolls were sent to Rochester and the money forwarded from there (p. 23). No bank account was kept in Virginia. No materials were purchased in the State of Virginia (p. 16). In the progress of the installation it was necessary to dig shallow trenches along the railroad track, roughly not over *1,600 feet* long to *100 miles* of track (p. 16), and to erect iron standards about two miles apart bearing the semaphore arms and other devices. The Railway Company furnished and erected the necessary wooden

poles and wires (p. 22). From the nature of the signals they could not be put together in complete form before shipment.

Exhibits 3 to 10 inclusive, comprising chiefly blueprints and cuts, illustrate the complex nature of the signals manufactured by the plaintiff in error and graphically emphasize the inherent necessity of their installation by the manufacturer. Of these exhibits only Exhibit 5 (p. 35), a written description of the system, is printed in the record. The contract for the sale and installation, Exhibit 2 (p. 28), prepared by the Railway Company, provides that the General Railway Signal Company will furnish the devices and will install and put in place the signals and apparatus complete; that the apparatus contracted for shall consume only so much electricity; that the work of installation shall be subject to the approval of the Railway Company; that disagreements shall be referred to an officer of the Railway Company; that the plaintiff in error will indemnify the Railway Company against patent infringement suits; that the plaintiff in error will assume the risk of damage before completion; that the Railway Company may cancel the contract for lack of progress; that the plaintiff in error assumes liability for the negligence of its employees; that any payment on account shall not operate as an acceptance; that no claim for extra work shall be made except upon a written order; that the Railway Company will pay the prices specified in the unit price list marked Exhibit B; that the Railway Company will furnish whatever required by Exhibit A and also free transportation; and that alterations in the system shall be paid for or allowed on the basis of the prices in Exhibit B. Exhibit B (p. 33) fixes the price of each unit device delivered and in-

stalled in the space and on foundations provided by the Railway Company.

The statutes of Virginia alleged to be applicable to the situation of the plaintiff in error are as follows:

> "Sec. 1104. Every incorporated company doing business in this State shall have an office in the State, at which all claims against the company due residents of the State may be audited, settled and paid. Every such company incorporated under a jurisdiction beyond the limits of this State (and hereinafter designated as a foreign corporation) shall, before doing business in this State, present to the State Corporation Commission (a) a written power of attorney executed in duplicate, appointing some person residing in this State its agent, upon whom all legal process against the corporation may be served, and who shall be authorized to enter an appearance in its behalf; (b) two duly authenticated copies of the charter of the corporation; and (c) a certificate of the Auditor of Public Accounts, showing the payment into the treasury of the fee required by law to be paid by such corporation, and shall obtain from said Corporation Commission a certificate of authority to transact business in the State . . .
>
> Sec. 1105. If any foreign corporation shall transact business in this State without first obtaining such certificate of authority provided for in the preceding section, it shall be fined not less than ten dollars nor more than one thousand dollars, such fine to be imposed by the State Corporation Commission, whose duty it shall be to see that provisions of the preceding section are complied with . . ."

"Sec. 38a. Every foreign corporation, when it obtains from the State Corporation Commission a certificate of authority to do business in this State, shall pay an entrance fee into the treasury of Virginia to be ascertained and fixed as follows:

For a company whose maximum capital stock is fifty thousand dollars, or less, thirty dollars; for a company whose capital stock is over fifty thousand dollars, and not to exceed one million dollars, sixty cents for each one thousand dollars or fraction thereof; over one million dollars and not to exceed ten million dollars, one thousand dollars . . .

For the purpose of this act the amount to which the company is authorized by the terms of its charter to increase its capital stock shall be considered the maximum capital stock."

As the General Railway Signal Company sells its signals throughout the United States and usually is itself obliged to install them, if the contention of the Commonwealth is sustained it means that *every* State, through which a railway runs to which the plaintiff in error has sold its signals with incidental installation, may compel it to procure a license to do business and to pay a tax measured by its entire authorized capital stock, although it has no capital invested in the State, although it has not established its business there, although it is engaged in the only way it can in the interstate sale of its products, and although in installing them it is improving and making more efficient an instrumentality of interstate commerce.

Must a corporation manufacturer of railway signals or other complex machinery, incapable of complete assembling before shipment and requiring prepared

foundations, pay each State in which it may make sales of its products a tax upon its entire capital or business for the privilege of completing the sale and delivery?

SPECIFICATION OF THE ERRORS

1. The courts below erred in holding that the General Railway Signal Company had violated § 1104 of the Code of Virginia, for the reason that the General Railway Signal Company was not doing business in Virginia.

2. The courts below erred in holding that the General Railway Signal Company had violated § 1104 of the Code of Virginia and in fining it for such alleged violation, for the reason that the sale of the General Railway Signal Company's railway signals to the Southern Railway Company, including their installation upon its railroad, was a transaction of interstate commerce and protected by the commerce clause of the federal Constitution.

3. The courts below erred in holding that the General Railway Signal Company had violated § 1104 of the Code of Virginia and in fining it for such alleged violation, for the reason that the imposition of a tax by the Virginia statutes upon the General Railway Signal Company's entire capital stock as a condition of its doing intrastate business in connection with its interstate business was repugnant to the federal Constitution.

4. The courts below erred in holding that the General Railway Signal Company had violated § 1104 of the Code of Virginia and in fining it for such alleged violation, for the reason that in the installation alone of its railway signals upon the Southern Railway the

General Railway Signal Company was engaged in interstate commerce.

BRIEF OF THE ARGUMENT

I.

The plaintiff in error was not doing business in Virginia.

This is a federal question. *Provident Savings Life Assurance Society v. Kentucky, 239 U. S. 103.*

Mr. Beale, in his authoritative work on Foreign Corporations, in the chapter "Doing Business," at section 201 says:

> "In these days when incorporation is the commonest form of business association, and when loose corporation laws prevail in so many States, some of which, bidding against each other for business, offer special inducements in the way of restricted liability and unrestricted power, no State would be prepared to accept the doctrine of *laissez faire* and give foreign corporations free rein.
>
> *But the evil to be avoided exists only when the foreign corporation is in a fair sense in competition with domestic corporations and individuals; that is, when it is establishing or attempting to establish a business within the State.*"

The phrase "doing business" is undoubtedly

hard to define. It was said in *Eastern Bldg. & Loan Ass'n v. Bedford, 88 Fed. 7,* that it "is of such an indefinite and uncertain meaning, so vague and ambiguous, so elastic in its quality, that an act of the legislature which uses it without defining it is almost nugatory for want of certainty as to its meaning." Since the date of that decision, however, the courts have been increasingly obliged to decide what "doing business" means, and, although the divergence in views has often been wide, the better modern opinion is well summarized in *Penn Collieries Co. v. McKeever, 183 N. Y. 98,* as follows:

> "To be 'doing business in this State' implies corporate continuity of conduct in that respect; such as might be evidenced by the investment of capital here, with the maintenance of an office for the transaction of its business, and those incidental circumstances, which attest the corporate intent to avail itself of the privilege to carry on a business. In short, it should appear, as it was intimated in the opinion in *People ex rel. Armstrong Cork Co. v. Barker (157 N. Y. 159, 165),* that the corporation and its officers intended 'to establish a continuous business in the City of New York and not one of a temporary character.' "

In the present case we have a foreign manufacturing corporation, whose plant is located in the State of its incorporation, which carries on none of its ordinary manufacturing or selling business in Virginia, which has no office nor permanent organi-

zation in Virginia, which has no capital invested nor bank account in the State, which buys no materials there, which has made no sales within Virginia, but whose employees have on two or three occasions entered Virginia for the purpose of completing *interstate sales of its products.* The sole ground for the contention that the defendant was doing business in Virginia is the work done in the State by the defendant's employees in putting together and installing upon the Southern Railway the defendant's products manufactured at Rochester and shipped into Virginia.

The defendant's signals, after manufacture in New York, were shipped to Virginia solely in pursuance of the previous contract with the Southern Railway Company. The only employees of the defendant in the State were those temporarily there for the purpose of effectuating the sale of the defendant's products by putting them together and placing them in position. This installation, upon the undisputed facts, was a necessary incident of the sale, a *sine qua non.* It cannot possibly be said that the defendant was in any "fair sense in competition with domestic corporations and individuals." Beyond question the defendant was not "establishing or attempting to establish a business within the State."

Just what did the defendant do in Virginia? It employed there about twenty men—eleven signal engineers and experienced men and nine laborers —for possibly four or five months altogether. They erected iron signal masts about two miles apart and fitted on them alternating current induction motors, signal arms, gears, relays and housings, transformers, line arresters, etc. (p. 14). To reach

the rails they dug short, shallow trenches, to an aggregate amount of not over 1,600 feet in a hundred miles. The Southern Railway Company furnished and put up the necessary wooden poles and wires (p. 22). The defendant's men applied the last coat of paint to the signal apparatus, the first coats having been applied at the factory (p. 19). (See pictorial exhibits 7, 8, 9 & 10, not printed in the record.)

The defendant did these things in Virginia only because it could not do them in New York, and it had no desire or intention to establish its business in Virginia. Because of the nature of the defendant's products it was a complicated, tedious job to install them ready for use, but the defendant was in Virginia for that purpose and no other. It was merely completing a sale to the Southern Railway Company, and it did no business and had no relations with the citizens of Virginia except for hiring a few laborers.

In short, the defendant was doing in the State isolated acts incidental to its manufacturing and selling business conducted in New York. These acts completed, it might or might not ever again have so much as one employee in the State. To force such a casual, occasional entrant to secure a license to do business, continuously to maintain an office, to pay a license tax of $1,000 and an annual registration tax, would be, we respectfully submit, the height of injustice. The very language of the statutes regulating foreign corporations *doing business* in the State is manifestly ill chosen to achieve such a result.

"Doing business" connotes the establishment of the ordinary business of the corporation with the

intention of continuously carrying it on; it connotes a permanent organization in the State, an office, the investment of capital, permanent resident employees. There is all the difference between doing business and not doing business that there is between the words "permanent and continuous" and "temporary and sporadic."

This court early decided that single transactions in a State by a foreign corporation, even in the conduct of its ordinary business, did not constitute "doing business."

In *Cooper Manufacturing Company v. Ferguson, 113 U. S. 727,* the plaintiff, a foreign corporation, entered into a contract in Colorado to sell and deliver to the defendant in Colorado a steam engine and other machinery. The defendants claimed that the plaintiff was barred from maintaining a suit for the purchase price, because it had failed to obtain a license to do business in Colorado. The court held that the action could be maintained, saying in part:

> "Reasonably construed, the Constitution and statute of Colorado forbid, not the doing of a single act of business in the State, but the carrying on of business by a foreign corporation without the filing of the certificate and the appointment of an agent as required by the statute. The Constitution requires the foreign corporation to have one or more known places of business in the State before doing any business therein. This implies a purpose at least to do more than one act of business. For a corporation that has done but a single act of business, and proposes to do no more,

> can not have one or more known places of business in the State. To have known places of business, it must be carrying on, or intending to carry on, business. The statute passed to carry the provision of the Constitution into effect makes this plain, for the certificate which it requires to be filed by a foreign corporation must designate the principal place in the State where the business of the corporation is to be carried on. The meaning of the phrase "to carry on" when applied to business is well settled. In Worcester's dictionary the definition is: 'To prosecute, to help forward, to continue, as to carry on business.' The definition given to the same phrase in Webster's dictionary is: 'To continue, as to carry on a design; to manage or prosecute, as to carry on husbandry or trade.' "

The decision might have been upon the ground that the plaintiff was engaged in interstate commerce, but the court chose the ground logically prior in order of consideration. Of course, the whole subject of "doing business" is interwoven with the effect of the commerce clause of the Constitution and many decisions assign one ground or the other apparently without much discrimination. This is doubtless due to the tendency of the State courts to construe their statutes relating to the qualification of foreign corporations so as to exclude from their operation such corporations as are engaged in interstate commerce, irrespective of whether or not they actually do business in the State. More accurately speaking, however, if a

foreign corporation is not doing business, there is no need to discuss the commerce clause, while if it is doing business, it may still be relieved from compliance with State statutes if its business be interstate.

A collateral line of cases throws an illuminating sidelight upon this difference. It is held that a foreign corporation is not subject to process in a State unless it is doing business there, but that a corporation may be doing business in a State for the purpose of suit against it, if continuously in the State, while not subject to State foreign corporation laws because engaged in interstate commerce.

In *International Harvester Co. v. Kentucky, 234 U. S. 579,* this court upheld the service of process on an agent of the defendant in Kentucky, although it was engaged in purely interstate commerce, saying:

> "In order to hold it responsible under the process of the state court, it must appear that it was carrying on business within the state at the time of the attempted service. As we have said, we think it was. Here was a continuous course of business in the solicitation of orders which were sent to another state, and in response to which the machines of the Harvester Company were delivered within the state of Kentucky. This was a course of business, not a single transaction. The agents not only solicited such orders in Kentucky, but might there receive payment in money, checks, or drafts. They might take notes of customers, which notes were made payable, and

doubtless were collected, at any bank in Kentucky. This course of conduct of authorized agents within the state in our judgment constituted a doing of business there in such wise that the Harvester Company might be fairly said to have been there, doing business, and amenable to the process of the courts of the state.

. . . . . .

True, it has been held time and again that a state cannot burden interstate commerce or pass laws which amount to the regulation of such commerce; but this is a long way from holding that the ordinary process of the courts may not reach corporations carrying on business within the state which is wholly of an interstate commerce character. Such corporations are within the state, receiving the protection of its laws, and may, and often do, have large properties located within the state."

To the same effect are *St. Louis S. W. Ry. Co. v. Alexander, 227 U. S. 218; Washington-Virginia Ry. Co. v. Real Estate Trust Co., 238 U. S. 185; Tauza v. Susquehanna Coal Co., 220 N. Y. 259.* But when the corporation is not doing business in the State, service there on its officers is invalid. *Riverside Cotton Mills v. Menefee, 237 U. S. 189; Phila. & Reading Ry. Co. v. McKibbin, 243 U. S. 264; Toledo Rys. & Lt. Co. v. Hill, 244 U. S. 49. Cf. Green v. C., B. & Q. R. Co., 205 U. S. 530; Case v. Smith & Co., 152 Fed. 730; Eirich v. Donnelly Const. Co., 104 Fed. 1.*

It should not be difficult to perceive the very

substantial difference between the position of the Harvester Company in the above decision, which was *continuously in the State* by its many agents, engaged in a permanent course of business, and was accordingly held to be doing business there, although immune from State regulation because its business was interstate, and the position of the General Railway Signal Company, which entered Virginia temporarily for the sole purpose of completing definite sales already made to one customer, and was not doing business there, aside from any application of the commerce clause.

The defendant in error called as a witness a Virginia lawyer who had had trouble in instituting suit against the General Railway Signal Company on behalf of one of the Virginia laborers employed by it (p. 19). Apparently it was hard to find any representative of the defendant to serve, which is scarcely consistent with its actively doing business there. But inability readily to start an action against a foreign corporation is no justification for requiring the registration of such a corporation, unless it be actually doing business in the State and business that is not interstate commerce. Every foreign corporation, which occasionally or casually enters a State without anyone seriously charging it with doing business there, comes into contact with citizens of the State and matters for litigation may develop. But obviously the aggrieved citizen, unless he be lucky enough to secure an attachment as in this case, must sue the debtor at his home, just as he would any natural person in like circumstances.

A fortiori, if a corporation is not doing business in a State for the purpose of service of process upon

it, it is not doing business for the purpose of the statutes regulating foreign corporations.

In determining whether or not a foreign corporation is doing business in a State, we respectfully but earnestly submit, there are two fundamental questions.

First, is the corporation in the State temporarily or permanently? It is there temporarily if it is making one or more occasional sales, if it is doing one or more definite pieces of work for specified persons. It is there permanently if it maintains an office or a resident force of salesmen. These are common tests. It is usually easy enough to ascertain if a corporation's entry into a State is for a temporary, occasional purpose, or for a permanent, continuous occupation. If the latter, the corporation must generally be considered as doing business in the State. If, however, it is there only temporarily, a further question must be put.

Second, what is the business of the corporation? If the corporation manufactures and sells machinery, for example, at a plant outside the State and enters the State only to make deliveries or to install or erect machinery which from its nature could not be shipped ready for operation, then the corporation is not doing business, *its* business, in the State. If, however, the business of the corporation is contracting or constructing, employing materials which it buys indiscriminately wherever it can, then, wherever it moves its construction plant, it is doing business, *its* business. A foreign construction company erecting an office building, for instance, is "in competition with domestic corporations and individuals" (Beale on Foreign Corporations, *supra*), even though that be its only

transaction within the State, but the occasional necessary installation by a foreign manufacturing company of its own products already sold from without the State is in no fair sense a competitive act.

The actual *work* in the State that is done by both corporations may be exactly the same, but one may be doing business in the State and the other not. This obvious point, clear from many cases, the courts below missed altogether. In other words, a foreign corporation might manufacture and sell an article and deliver or install it in the State where sold without doing business there, but a corporation engaged in the delivery or construction business, which was employed by the manufacturer to deliver or install its products in the State, would certainly be doing business there. In the following decision the court has caught the essence of the difference, although it unnecessarily, we think, invokes the commerce clause.

In *Buffalo Refrigerating Mach. Co. v. Penn Heat & Power Co., 178 Fed. 696 (C. C. A., 3 circ.)*, the plaintiff, a foreign corporation engaged in engineering and contracting, contracted to erect a plant in Pennsylvania. The court held it to be doing business there, saying:

> "The Buffalo Company is not a manufacturing company, so that *Mearshon v. Lumber Co.* and other decisions of that class do not apply. Its charter was not offered in evidence; but its president testified that its business was engineering and contracting, that it had no factory or workshop where anything was made, and did not manufacture the machinery which it designed, that its capital

was invested chiefly in patterns, drawings, and the good will of the business, and that its usual agreements contemplated—as did the agreement in suit—the buying and bringing together of the parts necessary to complete any particular plant. It bought the materials wherever its advantage was served, and assembled them at a given place, putting them together there in order to make an operative machine. It is undoubtedly true, as its counsel argues, that the Buffalo Company did no more than is done by a foreign corporate manufacturer who sells a machine in this state, ships it from the foreign factory, and puts it together here; and it is plausibly contended that, as the foreign manufacturer is protected by the commerce clause of the federal Constitution, the plaintiff company should enjoy the same protection. But the essential difference is that, while the result is the same—the buyer gets a completed machine—the process differs materially. In the one case the corporate power is to manufacture and sell; in the other, to furnish plans and drawings, and to erect. And as the two businesses are distinct, although they may produce the same result, so also the legal consequences are distinct. The manufacturing company is protected by the federal Constitution, because its business is to carry on commerce; the engineering company is not thus protected, because its business is not to carry on commerce, but is of a different character."

In the above discussion of the two fundamental questions we have used "doing business" in its stricter sense, that of the decisions dealing with service of process. Of course, in some cases where the corporation is strictly doing its ordinary business, the licensing statutes are held not to apply because the business is interstate or consists of an isolated transaction.

Undoubtedly this court would never have had the present case to decide, had it not been for its decision in *Browning v. Waycross, 233 U. S. 16.* That is the authority on which the State Corporation Commission chiefly and necessarily relied in summoning the defendant before it and in imposing its fine. For several reasons, however, only one of which needs immediate mention, *Browning v. Waycross* is no authority for the complainant, and, on the contrary, provides an illustration of our position. The defendant, an individual agent, was convicted under a local ordinance for carrying on the business of erecting lightning rods without a license. As a matter of fact, he *had* carried on the business,—he admitted it,—and no doubt his employer, the foreign corporation, was doing business in Georgia. By every criterion we have advanced that would be so. The foreign corporation was by fair inference permanently and continuously in the State (see our first question above). Whether or not, though doing business, it was subject to a State license tax, is another question. But the present defendant, unlike the defendant or his employer in *Browning v. Waycross,* has not been carrying on a continuous course of business in Virginia.

Pennsylvania, which also figured in *Buffalo Re-*

frigerating Mach. Co. v. Penn Heat & Power Co., supra, has provided us with two decisions which illustrate our position as neatly as possible. These are *Williams, Inc. v. Golden & Crick, 247 Pa. St. 397,* cited in our brief before the Virginia Court of Appeals, and *Delaware River Quarry & Construction Co. v. Bethlehem & Nazareth Passenger Ry. Co., 204 Pa. St. 22,* cited in the Attorney-General's brief below.

In *Williams, Inc. v. Golden & Crick, 247 Pa. St. 397,* the facts appear in the following extract from the court's opinion:

> "Whether the plaintiff can recover or not depends upon the question whether in making the contract in suit and doing the kind of work done by it under the circumstances of the case it can be said to have been doing business in the State of Pennsylvania without registration. It appeared from the evidence that the company has its offices, drafting rooms, workshop and foundries all in the State of New York, and that it has none of its capital invested anywhere except in the State of New York, and that its business consists in making drawings and moulds for ornamental bronze work and casting the same to conform with the specifications for various buildings, having practically no stock of finished products on hand, but making each casting to fit the particular place designed for it. It further appears that when these castings are thus made they are sent by freight, consigned to the company itself at the place where they are to be put up, and that some skilled workmen

are sent from the home office to put up and install the work in place, it being testified and not denied that this was a matter which required skill and a knowledge of the work such as would not ordinarily be found among the workmen engaged in ordinary building, and that in addition to these workmen some laborers were hired at the place where work was to be so put up, to assist in handling and putting it up; and this was the course pursued in the present case. It also appeared from the testimony that the plaintiff was not the only corporation engaged in the making of ornamental metal work of this kind, but that there were three or four other establishments of a similar kind in the United States. It further appeared that the plaintiff had been engaged for many years in the same kind of work and had put the same kind of work into bank buildings and others in various parts of Pennsylvania during a number of preceding years, upon contracts made special for each case in substantially the same manner as the contract in the present case. We are clearly of opinion that this does not show a doing of business in Pennsylvania within the meaning of the registration acts. The plaintiff had not established an office or transferred any part of its capital to the State, nor carried on its ordinary business here. If it had merely taken orders to make and ship to Pittsburgh the ornamental work sued for, there would of course be no doubt that it had a right to do that without registration. We are unable to see how the fact that in addition

> to sending the material it sends its skilled employees to set it up can make any difference. We are therefore of opinion that the defendant is not entitled to judgment non obstante veredicto."

In *Delaware River Quarry & Construction Co. v. Bethlehem & Nazareth Passenger Ry. Co., 204 Pa. St. 22*, the syllabus reads:

> "Where a foreign corporation comes into this State and engages in the business of constructing an electric railway during a period of six months, and in this business employs large numbers of men and nearly all of its capital, and does not file a statement in the office of the Secretary of the Commonwealth as required by [the statute], until two months after the work was completed, it cannot maintain an action for labor and materials furnished by it during the progress of the work."

The court said, as quoted in the Attorney-General's brief:

> "This act has been liberally construed and isolated transactions between a foreign corporation and citizens of this State have been held not to come within its prohibition, and only such corporations as have entered this State by their agents and prosecuted their ordinary business here have been considered as doing business in violation of the act. That the plaintiff is within the prohibition there is little room for doubt. It came into the State

> with its agents and workmen and for the period of six months was engaged in the continuous prosecution of its ordinary business, employing a large amount, if not all, of its capital and creating new obligations day by day."

Applying our two test questions to the facts in the above cases, the decisions are entirely consistent and sound. Each foreign corporation was in Pennsylvania only temporarily and occasionally, but one manufactured and sold ornamental bronze, incidentally installing it, and the other was a railroad construction company whose primary and chief business was to do just what it was doing in Pennsylvania, buying its materials and supplies in or out of Pennsylvania.

The only way in which the defendant in error can invoke the rule of the railroad case is by making over and distorting the facts in the present case to suit itself. It contended that in the case at bar the General Railway Signal Company was engaged in the prosecution of its ordinary business,—in the face of the undisputed facts that its business was the manufacture and sale of railway signals at Rochester, New York; that it installed its signals only where the purchaser was not competent to do so; that it employed in Virginia only a handful of men, a minute fraction of its employees engaged in manufacturing; and that it made its profit on the sale of its signals. That the Pennsylvania court in its concept of "ordinary business" had no such idea in mind as the purely installation work done by the plaintiff in error is most evident from a comparison of the facts in the

Golden & Crick case and from the reference of the court in the railroad construction case to the employment by the foreign corporation of nearly all of its capital in the work, which the Attorney-General conceded was not so in our case.

Even less than the New York corporation which installed the ornamental bronze work in the Pennsylvania building is the defendant doing business in the States where it installs its signals. It contracts with a railway company, whose principal office is quite likely to be in none of the States through which its railroad runs, for the manufacture and sale to it of railway signals for use along its lines. Through the exigencies of its contracts, in cases where the purchaser is not competent to install the signals, it may perform installation work, as it may chance, in one State or another. In the case of the Southern Railway Company the installation happened to take place partly in Virginia, as well as in Georgia, Tennessee and other States. But by no stretch of the imagination can it be said that the defendant has ever intended to establish and maintain a business in Virginia—to do business there—nor has it ever done so.

The soundness of our test questions is further confirmed by numberless decisions, which affirmatively or negatively make it increasingly clear that the defendant was not doing business in Virginia. In the following cases, in which the foreign corporation was held not to be doing business in the State in question, we find that in each instance it was only temporarily there and was primarily a manufacturing and selling company, although making installations of its products in the State.

For example, in *White Furnace Co. v. Miller*

Transfer Co., 131 App. Div. (N. Y.) 559, a foreign corporation contracted to manufacture and install two furnaces, which it did, taking parts of two months for the installation. The court said:

> "So far as the evidence discloses, the plaintiff had no office and did no business in this State other than that of furnishing and installing the furnaces and doing the work under the contract. We think the plaintiff was not doing business in this State within the contemplation of the section referred to."

Puffer Mfg. Co. v. Kelly, 73 So. (Ala.) 403 (installing soda fountain);

Citizens Nat'l Bank v. Bucheit, 71 So. (Ala.) 82 (accepting notes and installing bottle washer);

Gates Iron Wks. v. Cohen, 7 Colo. App. 341 (erecting mining mill and machinery);

Black-Clawson Co. v. Carlyle Paper Co., 133 Ill. App. 61 (furnishing superintendent of erection);

Mergenthaler Linotype Co. v. Hays, 168 S. W. (Mo.) 239 (erection of linotype machine);

Chuse Engine Co. v. Vromania Apartment Co., 154 Mo. App. 139 (erecting machinery);

Blevinns v. Fairley, 71 Mo. App. 259 (equipping creamery);

Flint v. McDonald, 114 N. W. (S. D.) 684 (erecting water tank and tower);

Milan Milling Co. v. Gorten, 93 Tenn. 590 (installing milling machinery);

Davis & Rankin Bldg. & Mfg. Co. v. Caigle, 53 S. W. (Tenn.) 240 (building creamery plant);

Leschen Rope Co. v. Moser, 159 S. W. (Tex.) 1018 (furnishing superintendent of construction);

Bowser & Co. v. Savidusky, 142 N. W. (Wis.) 182 (installing dry cleaning machinery);

Wolf Co. v. Kutch, 132 N. W. (Wis.) 981 (assisting in erection of machinery);

Vulcan Steam Shovel Co. v. Flanders, 205 Fed. 102 (installing steam shovel);

Natural Carbon Paint Co. v. Bredel Co., 193 Fed. 897 (erecting retorts and other apparatus);

Oakland Sugar Mill Co. v. Wolf Co., 118 Fed. 239 (equipping refinery);

Davis & Rankin Bldg. & Mfg. Co. v. Dix, 64 Fed. 406 (equipping creamery).

See also

Simmons Burks Co. v. Linton, 117 S. W. (Ark.) 775;

General Conference v. Berkey, 105 Pac. (Cal.) 411;

Cockburn v. Kinsley, 135 Pac. (Colo.) 1112;

Roseberry v. Valley Bldg. Ass'n, 83 Pac. (Colo.) 637;
Alpena Portland Cement Co. v. Jenkins Co., 91 N. E. (Ill.) 480;
Woods Production Co. v. C. C. & L. R. R. Co., 147 Ill. App. 568;
Hollowell v. Smith A. C. Co., 83 N. E. (Ind.) 772;
State v. American Book Co., 76 Pac. (Kans.) 411;
Louisville Trust Co. v. Bayer Steam Soot Blower Co., 179 S. W. (Ky.) 1034;
Standard Fashion Co. v. Cummings, 153 N. W. (Mich.) 814;
Lutes Co. v. Wysong, 110 N. W. (Minn.) 367;
Clark v. Kansas Petroleum Co., 129 S. W. (Mo.) 466;
Doctor v. Desmond, 82 Atl. (N. J.) 522;
Burrowes Co. v. Caplin, 127 App. Div. (N. Y.) 317;
Ozark Cooperage Co. v. Quaker City Cooperage Co., 112 App. Div. (N. Y.) 62;
State v. Robb Lawrence Co., 106 N. W. (N. D.) 406;
Harrell v. Peters Cartridge Co., 36 Okla. 684;
Berger v. Pa. R. R. Co., 27 R. I. 583;
American Mfg. Co. v. Skidmore, 170 S. W. (Tex.) 128;
Harkins v. State, 75 S. W. (Tex.) 26;

Booth & Co. v. Weigand, 83 Pac. (Utah) 734;

Smith & Co. v. Dickinson, 142 Pac. (Wash.) 1133;

Ladd Metals Co. v. American Mining Co., 152 Fed. 1008;

Ammons v. Brunswick-Balke Collender Co., 141 Fed. 570;

Empire Mining & Milling Co. v. Tombstone Mining & Milling Co., 100 Fed. 910.

In the following cases, in which the foreign corporation was held to be doing business in the State in question, it appears that in each instance it was permanently there or was carrying on its primary business as it would in its home State.

Pembina Mining Co. v. Pa., 125 U. S. 181;

Horn Silver Mining Co. v. N. Y., 143 U. S. 305;

Diamond Glue Co. v. U. S. Glue Co., 187 U. S. 611;

Interstate Amusement Co. v. Albert, 239 U. S. 560;

Ala. West. R. R. Co. v. Talley-Bates Const. Co., 163 Ala. 396;

Muller Mfg. Co. v. First Nat'l Bank, 57 So. (Ala.) 762;

Ala. Amusement Co. v. E. Lake Chutes Co., 56 So. (Ala.) 961;

Hastings Industrial Co. v. Moran, 143 Mich. 697;

Imperial Curtain Co. v. Jacob, 127 N. W. (Mich.) 772;
Will v. City of Bismarck, 163 N. W. (N. D.) 550;
St. Louis Metal Co. v. Beilhartz, 88 S. W. (Tex.) 512;
Smythe Co. v. Fort Worth Glass Co., 128 S. W. 1136, 142 S. W. (Tex.) 1157;
Peck-Hammond Co. v. Hamilton School District, 181 S. W. (Tex.) 697;
Kinnear & Gager Mfg. Co. v. Miner, 96 Atl. (Vt.) 333;
Dalton Adding Machine Co. v. Commonwealth, 118 Va. 563;
Loomis v. People's Const. Co., 211 Fed. 453;
Pittsburgh Const. Co. v. W. Side Belt R. Co., 154 Fed. 929.

We realize that color is lent to the contention of the defendant in error because the business of the General Railway Company was unusual,—manufacturing bulky, highly complex, patented devices, requiring the most careful installation by experts. But that is no reason why the plaintiff in error should be penalized by the application of a different rule than in the case of manufacturers of more ordinary and, we may say, less indispensable machinery.

II.

The sale of railway signals by the plaintiff in error to the Southern Railway Company, including their installation upon its railroad, was a transaction of interstate commerce.

Even if the plaintiff in error were held to be doing business in the State of Virginia, its business was interstate commerce and was protected by the federal Constitution against State burdens.

"Doing business," we have seen under point I, does not mean the transaction in a State of isolated acts which may or may not be repeated. If a corporation is not doing business in the State, the foreign corporation acts do not apply to it. But a corporation may be doing business and yet be immune from State burdens because that business is interstate. In such a case the State foreign corporation acts are usually construed to except interstate commerce done in the State. If they are construed otherwise, they are unconstitutional.

So far as the defendant is concerned, therefore, if it is not doing business in Virginia it is not subject to the Virginia license tax: if it is doing business, but business that is interstate commerce, it is equally free from the tax, whether the statute be construed to except corporations engaged in interstate commerce or be held unconstitutional. That is immaterial to the defendant.

In *Internat'l Text Book Co. v. Tone, 220 N. Y. 313,* the plaintiff, a Pennsylvania corporation, had agencies in New York to solicit pupils, whose applications were accepted at Scranton. Upon suing the defendant pupil his defense was that the plain-

tiff had failed to procure a New York license. The court held a license unnecessary, saying:

> "Business may be sufficient to subject the foreign corporation that does it to the service of process, and yet insufficient to require it to take out a license. In *Tauza v. Susquehanna Coal Co. (220 N. Y. 259)*, decided herewith, this distinction is emphasized. The question before us here is not one of the jurisdiction of courts under the rules of private international law. It is one of statutory construction. We have steadily upheld the right of foreign corporations, without the aid of any license, to engage in activities incidental to commerce between the states.
>
> To read the statutes otherwise would be to condemn them as unconstitutional. They would then be unlawful obstructions of interstate commerce. The Supreme Court has so held in two cases where the plaintiff's contracts were involved (*International Text Book Co. v. Pigg; International Text Book Co. v. Lynch, supra*). There is no substantial distinction between those cases and the one at hand. The power of a state to exclude a foreign corporation is subject to the limitation that freedom of interstate commerce is not to be impaired (*W. U. Tel. Co. v. Kansas, 216 U. S. 1, 27; State of So. Car. ex rel. Phoenix Mut. Life Ins. Co. v. McMaster, 237 U. S. 63; Sioux Remedy Co. v. Cope, 235 U. S. 197, 203; Crenshaw v. Arkansas, 227 U. S. 389; Interstate Amusement Co. v. Albert, 239 U. S. 560; Marconi W. T. Co. v. Comm., 218 Mass. 558, 569; German-*

> *Amer. Coffee Co. v. Diehl, 216 N. Y. 57, 64*). The corporation may come here without a license when the purposes of interstate business require its presence (*W. U. Tel. Co. v. Kansas, supra*)."

After all, this is one country and has been ever since the Constitution was ratified by the requisite States. The framers of the Constitution had a vision that some of their descendants have lacked, who have from time to time attempted through limitation or perversion of the law to defeat the plain intent of the broad and beneficent provisions of the Constitution. But always, when fairly and reasonably construed, the Constitution has shown itself entirely equal to the solution of the novel and increasingly complex problems of modern business. And in the Constitution is contained no broader and more plenary power than that to regulate interstate and foreign commerce.

In *Gibbons v. Ogden, 9 Wheat. 1*, the court defined commerce as follows:

> "The words are: 'Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.' The subject to be regulated is commerce; and our Constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it compre-

> hends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more,—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

As business between the States developed it was held, in accord with the definition of commerce in *Gibbons v. Ogden*, that procuring orders in a State for shipment into the State was properly a part of interstate commerce. It was not absolutely necessary to conduct the business in that manner, but it was the natural, convenient way. And so, in *Robbins v. Shelby County Taxing District, 120 U. S. 489*, drummers for interstate goods were not required to pay a State license fee. The court said, its broad reasoning being peculiarly applicable to the present situation:

> "In view of these fundamental principles, which are to govern our decision, we may approach the question submitted to us in the present case, and inquire whether it is competent for a State to levy a tax or impose any other restriction upon the citizens or inhabitants of other States, for selling or seeking to sell their goods in such State before they are introduced therein. Do not such restrictions affect the very foundation of interstate trade? How is a manufacturer, or a merchant, of one State to sell his goods in another

State without, in some way, obtaining orders therefor? Must he be compelled to send them at a venture, without knowing whether there is any demand for them? This may, undoubtedly, be safely done with regard to some products for which there is always a market and a demand, or where the course of trade has established a general and unlimited demand. A raiser of farm produce in New Jersey or Connecticut, or a manufacturer of leather or wooden ware, may, perhaps, safely take his goods to the city of New York and be sure of finding a stable and reliable market for them. But there are hundreds, perhaps thousands, of articles which no person would think of exporting to another State without first procuring an order for them. It is true, a merchant or manufacturer in one State may erect or hire a warehouse or a store in another State, in which to place his goods, and await the chances of being able to sell them. But this would require a warehouse or a store in every State with which he might desire to trade. Surely, he cannot be compelled to take this inconvenient and expensive course. In certain branches of business it may be adopted with advantage. Many manufacturers do open houses or places of business in other States than those in which they reside, and send their goods there to be kept on sale. But this is a matter of convenience, and not of compulsion, and would neither suit the convenience nor be within the ability of many others engaged in the same kind of business, and would be entirely un-

suited to many branches of business. In these cases, then, what shall the merchant or manufacturer do who wishes to sell his goods in other States? Must he sit still in his factory or warehouse and wait for the people of those States to come to him? This would be a silly and ruinous proceeding.

The only other way, and the one, perhaps, which most extensively prevails, is to obtain orders from persons residing or doing business in those other States. But how is the merchant or manufacturer to secure such orders? If he may be taxed by such States for doing so, who shall limit the tax? It may amount to prohibition. To say that such a tax is not a burden upon interstate commerce, is to speak at least unadvisedly and without due attention to the truth of things."

It makes no difference that the agents of the foreign seller live in the State or represent several foreign principals. Their continuous course of business in the State is still a part of interstate commerce. In *Stockard v. Morgan, 185 U. S. 27,* merchandise brokers of Chattanooga, Tennessee, who represented out of the State principals exclusively, were held not liable to a license tax, the court saying:

"We attach no importance to the fact that in the Robbins case the individual taxed resided outside of the State. He was taxed by reason of his business or occupation while within it, and the tax was held to be a tax

upon interstate commerce. Nor does the fact that the complainants acted for more than one person residing outside of the State affect the question. If while so acting and soliciting orders within the State for the sale of property for one nonresident of the State, the person so soliciting was exempt from taxation on account of that business, because the tax would be upon interstate commerce, we do not see how he could become liable for such tax because he did business for more than one individual, firm, or corporation, all being nonresidents of the State of Tennessee. The fact that the State or the court may call the business of an individual, when employed by more than one person outside of the State, to sell their merchandise upon commission, a 'brokerage business,' gives no authority to the State to tax such a business as complainants'. The name does not alter the character of the transaction, nor prevent the tax thus laid from being a tax upon interstate commerce."

As it is proper to procure orders in the State, so it is necessary to deliver there the goods ordered. They need not be shipped directly to the purchaser, but may be delivered in any reasonably convenient way. In *Caldwell v. North Carolina, 187 U. S. 622*, Caldwell had been tried before a North Carolina county court for an alleged offense in having engaged in the business of delivering pictures without first obtaining a license so to do, in accordance with an ordinance. As an employee of the Chicago Portrait Company, a foreign corporation, he came to Greensboro for the purpose of delivering

pictures and frames, for which contracts of sale had previously been made by other employees of the Chicago Portrait Company. The defendant took from the freight station large packages of pictures and frames, which had been shipped addressed to the Chicago Portrait Company; opened the packages in his room in the hotel; placed the pictures in their proper frames; and delivered the pictures, one at a time, to the purchasers in Greensboro. The Supreme Court of North Carolina affirmed a judgment of guilty and the cause was brought to this court by a writ of error. The court held that the ordinance, as construed by the Supreme Court of North Carolina to cover the case of the defendant, was invalid as an attempt to interfere with and regulate interstate commerce, pointing out that the fact that the pictures and frames were put together after arrival in the State and that they were shipped not directly to the purchasers, but to an agent, in no wise changed the character of the commerce as interstate.

So in *Rearick v. Pennsylvania, 203 U. S. 507,* a Pennsylvania license tax on the agent of an Ohio corporation who took orders for brooms, among other things, which were shipped to him wrapped together and by him opened and distributed, was held invalid, the court saying:

> "'Commerce among the several States' is a practical conception, not drawn from the 'witty diversities' (*Yaites v. Gough*) *Yelv. 33*) of the law of sales. *Swift & Co. v. United States, 196 U. S. 375, 398, 399, 49 L. ed. 518, 525, 526, 25 Sup. Ct. Rep. 276.*

> The brooms were specifically appropriated to specific contracts, in a practical, if not in a technical, sense. Under such circumstances it is plain that, wherever might have been the title, the transport of the brooms for the purpose of fulfilling the contracts was protected commerce."

Again, in *Western Oil Refining Co. v. Lipscomb, 244 U. S. 346*, the court held the imposition of a license tax improper in the following circumstances:

> "This was a suit by an Indiana corporation to recover money paid under protest as an occupation or privilege tax in Tennessee. The plaintiff had an oil refinery in Illinois and a steel barrel factory in Indiana, and was selling the products of its refinery and factory upon orders taken by traveling salesmen in its employ. For the purpose of filling orders so taken in Maury county, Tennessee, it shipped into that county from its refinery a tank car of oil and from its factory a car of steel barrels. Both cars were billed to the plaintiff at Columbia, in that county, and, after the orders from that place were filled, were rebilled to the plaintiff at Mount Pleasant, in the same county, where the orders from the latter place were filled. At both places the orders were filled directly from the cars by a traveling agent of the plaintiff and the purchase price was collected at the time,—this being what was contemplated when the orders were taken. If the order

was for both oil and barrels, the oil was drawn out of the tank car into the barrels and the two were jointly delivered; and if oil alone was ordered, it was drawn from the tank car into barrels otherwise provided by the buyer. When the cars were originally shipped they contained just the quantity of oil and the number of barrels required to fill the orders from the two places, and the plaintiff intended that they should remain at Columbia only long enough to fill the orders from that place and then should be sent to Mount Pleasant, so the orders from that place could also be filled. The quantity of oil and the number of barrels required to fill the orders from Mount Pleasant were in the cars continuously from the time of the original shipment until the cars reached that place. The plaintiff had no office or local agent in Tennessee, nor any oil depot, storage tank, or warehouse in that state."

The retention of title and possession until payment upon delivery in the State does not rob the transaction of its character as interstate commerce. That is simply a convenient method of collection and the substance of the sale is the agreement to sell and buy. In *Norfolk & Western Ry. Co. v. Sims, 191 U. S. 441,* a license tax upon those selling sewing machines in the State was held unconstitutional so far as applied to a machine shipped into the State on a C. O. D. written order. The court said:

"While it may be entirely true that the

property in the thing sold does not pass under a C. O. D. consignment until delivery of the goods and payment to the carrier, and hence it may be said that the sale is not completed until then, yet, as matter of fact, the bargain is made, and the contract of sale completed as such, when the order is received in Chicago, and the machine shipped in pursuance thereof.

A sale really consists of two separate and distinct elements: first, a contract of sale, which is completed when the offer is made and accepted; and, second, a delivery of the property which may precede, be accompanied by, or follow the payment of the price, as may have been agreed upon between the parties. The substance of the sale is the agreement to sell, and its acceptance. That possession shall be retained until payment of the price may or may not have been a part of the original bargain, but in substance it is a mere method of collection, and we have never understood that a license could be imposed upon this transaction except in connection with the prior agreement to sell, although, in certain cases arising under the police power, it has been held that the sale is not complete until delivery, and sometimes not until payment. Were it not for the opinion of the Supreme Court of North Carolina, we should have said that the words 'engaged in the business of selling the same within the State' had reference to the word 'selling' in its popular and ordinary sense of selling from a stock on hand or upon a special order to a manufacturer, and

> not to a mere method of collecting the money; but, however this may be, it is evident the State courts could not give it a construction which would operate as an interference with interstate commerce, and that upon this question the opinion of this court is controlling."

Even the exercise in a State of an option to purchase, given in connection with an interstate sale, is protected by the commerce clause if as a practical matter the business is one affair. In *Davis v. Virginia, 236 U. S. 697,* involving the same statute as in the present case, the opinion of the court was as follows:

> "The plaintiff in error was convicted of peddling without a license. His defense was that, if applied to his dealings, the Virginia law would interfere with commerce among the States, contrary to article I., sec. 8 of the Constitution. The facts are as follows. The Empire Art Institute of New York sent soliciting agents to Virginia, who took orders on a blank furnished by the company. These blanks stated that the company would place a limited number of a 'new Aquarell Portrait' at cost of material, India Ink $1.98 and Water Color $3.96, and the one exhibited went on: 'On or about Apr. 10, 1911, we agree to deliver to the holder of this contract a fully finished Ink Portrait —x— as shown by our salesman. Mrs. T. P. Morrisette agrees to pay $1.98 for the portrait when delivered. We do not compel you to take frames from us, but owing to the delicate nature of

the work all portraits are delivered in appropriate frames which this ticket entitles you to select at wholesale prices.' On receipt of such order the company shipped the portrait when prepared, and, in a separate parcel, frames suitable for them, to an agent, in this case the plaintiff in error. The latter put the pictures into appropriate frames and then delivered the portraits, offering the customer a choice of three different styles of frames, the customer taking one or not, at his will.

The court below thought that the purchase of the frames was to be regarded as a separate transaction, occurring wholly in Virginia. Whether or not this was its technical aspect as an executed contract, it often has been pointed out that commerce among the States is a practical, not a technical conception. The preliminary contract bound the company to furnish a chance to take a frame with the portrait. Obviously it was contemplated that the frames would be sent from New York as well as the pictures, as in practice they were, and although the bargain was not complete until the company's offer was accepted in Virginia, the furnishing of the opportunity was a part of the interstate transaction. From the point of view of commerce, the business was one affair. *Dozier v. Alabama, 218 U. S. 124, 54 L. ed. 965, 28 L.R.A.(N.S.) 264, 30 Sup. Ct. Rep. 649; Crenshaw v. Arkansas, 227 U. S. 389, 57 L. ed. 565, 33 Sup. Ct. Rep. 294; Browning v. Waycross, 233 U. S. 16, 21, 58 L. ed. 828, 832, 34 Sup. Ct. Rep. 578.*

Judgment reversed."

The right to enforce payment for interstate sales is so essential to interstate commerce as to be protected by the commerce clause. In *Sioux Remedy Co. v. Cope, 235 U. S. 197,* an Iowa corporation sued in South Dakota on a contract made in South Dakota for the sale of merchandise to be shipped from Iowa. The court reversed a holding of the Supreme Court of South Dakota that the Iowa corporation was precluded from suit because it had not qualified to do business in South Dakota, saying in part:

> "Of the first point it is enough to say that the right to demand and enforce payment for goods sold in interstate commerce, if not a part of such commerce, is so directly connected with it and is so essential to its existence and continuance that the imposition of unreasonable conditions upon this right must necessarily operate as a restraint or burden upon interstate commerce. The form or mode of imposing the conditions is not nearly so important as their necessary and practical operation, for, as was said in *Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 27, 54 L. ed. 355, 366, 30 Sup. Ct. Rep. 190:* 'If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things.' "

If interstate sales are made from goods kept in a warehouse in the State for shipment from time to time out of the State, no license can be imposed on the seller. In *Heyman v. Hays, 236 U. S. 178,* Tennessee attempted to impose a privilege tax upon a mail order liquor house. The following grounds for holding the business intrastate were assumed to exist:

> "(1) The existence of the goods in the State, held in a warehouse as stock susceptible of being sold in the State if there was a desire to do so, and ready to be shipped in the channels of interstate commerce; (2) the care and attention for the purpose of packing or otherwise which must be given to the goods situated in the State, to enable the interstate commerce shipment to be made; (3) the receipt in the State from other States of the orders; (4) the clerical force or assistance which was required in the State to keep an account of the shipments as made to other States, and the supervision in Tennessee which was required to conduct the exclusive business of shipping into other States and of receiving the price resulting from such shipment."

The court held the business interstate, saying:

> "We reach this conclusion because we are of opinion that, giving the fullest effect to the conditions stated, they were but the performance of acts accessory to and inhering in the right to make the interstate commerce shipments, and therefore to admit the power, be-

> cause of their existence, to burden the right to ship in interstate commerce, would necessarily be to recognize the authority to directly burden such right. In the nature of things the protection against the imposition of direct burdens upon the right to do interstate commerce, as often pointed out by this court, is not a mere abstraction, affording no real protection, but is practical and substantial, and embraces those acts which are necessary to the complete enjoyment of the right protected."

The installation of its signals in Virginia by the plaintiff in error was just as necessary to its interstate commerce as any of the acts within the State involved in the foregoing decisions.

In the discussion under point I we suggested two questions as helpful in determining whether or not a corporation was doing business in a State:—first, was the corporation there temporarily or permanently and, second, what was the business of the corporation? We are now concerned, assuming the corporation to be doing business in the State, with the problem whether or not its business was interstate commerce. Realizing the difficulty of applying rules to so complex a subject, we yet believe that the solution of the problem can usually be made easy by ascertaining the answers to two further questions, which partly overlap our former.

First, is the essence of the transaction, taken as a whole, the interstate sale or the work done in the State? In other words, which is only accessory to the other? The essence of the transaction is the sale if the corporation manufactures or deals

in goods for which it is seeking an outlet. The essence of it is the work done if the corporation is a contractor, having little or nothing to sell but its services. Applying the question to our case, was the General Railway Signal Company looking for a market for its signals or for work; was it a manufacturing company or a construction company? The undisputed facts furnish the answer. But if the sale is primary and the work in the State secondary, the second question must still be put.

Second, is the work done in the State reasonably incidental or necessary to the consummation of the interstate sale? In other words, does it naturally and conveniently go with the sale, or is it arbitrarily and needlessly attached to it? This inquiry may provoke differences of opinion in close cases and the difficulty of arriving at a conclusive answer in different states of fact is doubtless responsible for whatever apparent conflict of authority exists. Fortunately, however, in our case the answer is clear. The evidence shows that the signals sold the Southern Railway Company were complex and intricate and required installation by specially trained experts; that they could not be put together before shipment; that the manufacturer's trained employees were best fitted to install them; that the Southern Railway Company had no signal organization competent to install the signals; and that the installation by the manufacturer was necessary to effect the sale.

If our analysis is proper, the whole transaction in which the General Railway Signal Company was engaged was clearly interstate commerce and it could not be subjected to a license tax in Virginia.

We have seen from the decisions already cited that commerce embraces more than traffic. We have seen that agents may solicit orders for a foreign corporation, either upon terms of credit or reserving title until payment upon delivery, may go from one part of the State to another, or may maintain an office in one city, may reside, work and do their entire business in a State and come in hourly business relations with its citizens, without involving themselves or their employer in liability to the State for a license tax. Why? Because it would be inconvenient and hamper interstate commerce if manufacturers could not first find customers before shipping their goods into the State. We have seen that agents of a foreign corporation may receive goods shipped into the State to their employer, may assemble the subject matter of each order, may contract with draymen for the delivery of the orders, may sell frames to accompany pictures pursuant to a previous option, may collect the proceeds of sales, and may daily do business in the State with its citizens, without committing themselves or their employer to the payment of a State license tax. We have seen that a foreign corporation may sue in a State upon a contract made there for an interstate sale, and may keep in the State goods to be shipped in interstate commerce and employees to handle the goods, without procuring a State license. Why? Because all these things are accessory to the interstate sales and are reasonably incidental or necessary to their consummation.

The presence in the State of employees of a foreign corporation, then, their continuous presence in numbers, their daily intercourse and business

dealings with citizens of the State, do not subject the foreign corporation to the payment of the license fee imposed for doing business in the State, if, in fact, the corporation is engaged in the interstate sale of its products and the activity of its agents in the State is incidental or necessary to initiating or completing or otherwise furthering such sales. It is immaterial, therefore, if the General Railway Signal Company had in Virginia twenty employees (as they had), or a hundred,—off and on for a few months (as they did), or continuously for years,—if the plaintiff in error was primarily engaged in selling its signals and its employees, wherever hired or residing, were engaged in completing such sales.

The contention of the Commonwealth must be, first, that the transaction between the plaintiff in error and the Southern Railway Company as a whole was not a transaction of interstate commerce, or second, that the part performed in Virginia was not reasonably incidental or necessary to the interstate transaction. The indisputable facts are against it on both propositions.

The Commonwealth argues that the contract shows that the main purpose was to install and complete the signal system in Virginia. Of course, what the Railway Company wanted was a completed signal system: it emphasized the result, not the manufacture and shipment, which to it were necessary but preliminary. In the same way, however, where goods capable of being put together in final form before shipment are purchased, the main object of the purchaser is the delivery to him in completed form. He purchases the *goods;* he

does not contract for their manufacture and shipment. With him, too, the result is everything.

Nevertheless, in both cases the form of the contract is negligible; the real nature of the transaction can only be determined by weighing all its features. It is scarcely consonant with an unprejudiced survey of the facts solemnly to affirm that a manufacturer of railway signals, whose business is the manufacture and sale of such signals, from which it derives its profit, and which installs its signals only when it has to, adding eight to ten per cent to the selling price to cover the expense of installation, is to be regarded primarily as an erecting contractor. If the "greater" purpose is always the completed delivery in the State, then the "less" purpose of interstate sale does include and control the "greater," or the decisions of this court are wrong.

One significant factor in determining whether a transaction is primarily construction work and incidental interstate commerce, or primarily interstate commerce and incidental construction, is the nature of the materials or apparatus. If, although the contractor furnishes them from outside the State, the materials are readily purchasable in the market and *it is only their assembly in a certain manner within the State that alters them from general usefulness and adaptability into the specific structure desired,* then it is likely that the work in the State is the essence of the transaction. But if the contractor at its plant outside the State manufactures more or less ordinary materials into definite apparatus, *which already has a unique character before its shipment into the State,* then the necessary assembly in the State of that ap-

paratus into the completed whole for which it was solely adapted before shipment cannot outweigh the interstate commerce.

In the present case the signal apparatus was all manufactured outside the State and fully prepared so far as it could be for installation in Virginia before shipment there. Although the contract in evidence provided for a maximum price, the aggregate sum to be paid was to be figured on a specified price for each unit device furnished. Signal devices are as legitimate subjects of interstate commerce as sewing-machines. It is not the manufacturer's fault, and cannot nullify the interstate commerce, that, unlike sewing-machines, railway signals are so bulky as to require assembly at the place of delivery and so complex as to necessitate the manufacturer doing it. Unless and until railway companies acquire signal corps composed of former trained employees of the signal companies, which many may never care to do, the Commonwealth's contention would mean that *there could be no interstate commerce in railway signals.*

But the chief reliance of the Commonwealth is on the second theory,—that the part of the transaction performed in Virginia was not reasonably incidental or necessary to the interstate transaction,—and it finds assumed support in a decision of this court.

In *Browning v. Waycross, 233 U. S. 16,* an ordinance imposed an annual occupation tax of $25 upon lightning rod agents engaged in putting up or erecting lightning rods within the corporate limits of the City of Waycross. An agent convicted under this ordinance pleaded that he had erected rods as agent of a foreign corporation for

which he had solicited orders, the price paid including the duty to erect the rods. The court held that the erection of lightning rods was a local business and could be taxed, saying further:

> "Of course we are not called upon here to consider how far interstate commerce might be held to continue to apply to an article shipped from one State to another, after delivery and up to and including the time when the article was put together or made operative in the place of destination in a case where, because of some intrinsic and peculiar quality or inherent complexity of the article, the making of such agreement was essential to the accomplishment of the interstate transaction. In saying this we are not unmindful of the fact that some suggestion is here made that the putting up of the lightning rods after delivery by the agent of the seller was so vital and so essential as to render it impossible to contract without an agreement to that effect,—a suggestion, however, which we deem it unnecessary to do more than mention in order to refute it."

The outstanding feature of this case, so far as concerns our situation, is the significant language of the last paragraph of the opinion, quoted above. The court might have had in mind the present facts, so appropriate are its words. To paraphrase, in the present case the interstate commerce continued until the signals were put together and made operative in the place of destination, because on account of the intrinsic and peculiar quality

and inherent complexity of the signals the making of the agreement to install them was essential to the accomplishment of the interstate transaction. It requires no labored argument to explain the radical difference in this respect between railway signals and lightning rods. *Browning v. Waycross*, fairly read, is at best no authority for the complainant and actually supports the test questions which we have above suggested.

The defendant is admittedly a manufacturing corporation making interstate sales of its products. They have by their nature to be put together in place after arrival at their destination, and by reason of their complexity the manufacturer usually must do it. The installation would most certainly never have been undertaken except as incidental to the interstate traffic. The refusal by the State to permit it would just as certainly seriously hamper or prevent the defendant's interstate commerce. That is the whole story. The defendant has never done business in the State; but, whether it be so considered or not, it has made interstate sales of its goods to the Southern Railway Company in the only way that it can. It has consistently engaged in interstate commerce, and nothing else.

Browning v. Waycross has been eagerly invoked by State officials responsible for the enforcement of license taxes and by State courts anxious to extend the application of State statutes. We sometimes doubt if this court would have reached the same result so readily if the case had involved the payment of a license fee by the foreign corporation whose agent the defendant was. However truly in accord with former and subsequent deci-

sions of the court, it has been cited in pretended support of several reactionary State decisions.

In *Power Specialty Co. v. Michigan Power Co., 157 N. W. (Mich.) 408,* for instance, the element, present in our case, of a necessity for the installation by the manufacturer was lacking, although we think it might fairly be said that the installation was reasonably incidental to the sale. There the plaintiff, which had contracted to sell and erect superheaters, was denied relief because it had failed to procure a Michigan license. The court relied largely on *Browning v. Waycross,* saying:

> "It would seem that the decision in *Browning v. Waycross* contains a very clear definition of what constitutes interstate commerce, and what intrastate commerce. While in that case the court was considering the validity of an ordinance taxing lightning rod agents, it decided the case, not upon the theory that Browning was carrying on a business or doing a series of acts, but upon the theory that when material is shipped from one State into another and there installed, such act is intrastate commerce, unless it can be claimed that the case falls within the exception, viz.:
>
> 'After delivery and up to and including the time when the article was put together or made operative in the place of destination in a case where because of some intrinsic and peculiar quality or inherent complexity of the article, the making of such agreement was essential to the accomplishment of the interstate transaction.'
>
> It is asserted by counsel for appellee that 'it

is a very long jump from lightning rods to superheaters,' and that these superheaters were manifestly not simple appliances which defendant might readily have installed, or have had installed by local workmen. We have examined this record with great care and have been unable to find any testimony in support of this statement. We are constrained to say that plaintiff failed to show by evidence whether or not purchasers might, or might not, themselves readily install these superheaters, or have them installed by other local workmen. On the other hand, it is asserted by appellant that mechanics and engineers could be found in the city of Lansing competent to install these superheaters, and that the installing of them was a far less complicated piece of work than the installing of a steam or hot water heating system in an ordinary house. There is no evidence upon that subject."

See also *Sturtevant Co. v. Leitelt Iron Wks., 163 N. W. (Mich.) 13* (installing ventilating apparatus); *Palm Vacuum Cleaner Co. v. Bjornstad, 161 N. W. (Minn.) 215* (installing vacuum cleaner); *Buhler v. Burrowes Co., 171 S. W. (Tex.) 791* (installing screens); *York Mfg. Co. v. Colley, 172 S. W. (Tex.) 206* (installing ice plant); and *cf. Talbutt v. State, 44 S. W. (Tex.) 1091; State v. Gorham, 115 N. C. 721;* and *Dennard v. State, 16 Ga. App. 135* (lightning rod erection cases).

The cases in which it has been held that the transaction of sale was not interstate, but intra-

state, must, of course, be sharply distinguished. In general, if goods are first brought into a State and then sold, the transaction is intrastate commerce. The determining feature is not when the title passed, but whether or not the goods were shipped into the State for a particular purchaser pursuant to a previous contract of sale. The signals sold the Southern Railway Company were beyond dispute so appropriated.

American Steel & Wire Co. v. Speed, 192 U. S. 500, relied on by the Commonwealth, is thus readily distinguishable, and so also are *Hopkins v. U. S., 171 U. S. 578; Armour Packing Co. v. Lacy, 200 U. S. 226;* and *Banker Bros. Co. v. Pennsylvania, 222 U. S. 210.*

Then, again, a State may tax property within the State, although the interstate commerce has not terminated. But that is quite different from imposing an excise tax for the privilege of conducting such interstate commerce. In *General Oil Co. v. Crain, 209 U. S. 211,* oil held in the State by the Oil Company, which was otherwise doing business there, for distribution to points outside the State was held taxable. The court said:

> "The beginning and the ending of the transit which constitutes interstate commerce are easy to mark. The first is defined in *Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475,* to be the point of time that an article is committed to a carrier for transportation to the State of its destination, or started on its ultimate passage. The latter is defined to be, in *Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091,*

> the point of time at which it arrives at its destination. But intermediate between these points questions may arise."

This definition of interstate commerce, which was concerned with the taxation of property moving in it, is manifestly too narrow for the purpose of licensing foreign corporations. It would exclude all solicitation of orders, for example. Yet, in the truest sense, the signals shipped into Virginia did not arrive at their destination until they were installed.

In *American Steel & Wire Co. v. Speed, supra,* at page 521, is an interesting comparison of *Brown v. Houston, 114 U. S. 622,* and of *Leisy v. Hardin, 135 U. S. 100,* and *Lyng v. Michigan, 135 U. S. 161,* and, as said by Mr. Justice Moody in his dissenting opinion in *General Oil Co. v. Crain, supra:* "The case of *American Steel & Wire Co. v. Speed, 192 U. S. 500,* holds that articles, before they have ceased to be the subjects of interstate commerce, may still be reached by the taxing power of the State." It is instructive to compare the Crain case with *Heyman v. Hays, supra. Cf.* also *Darnell & Son Co. v. Memphis, 208 U. S. 113,* and *Webber v. Virginia, 103 U. S. 344.*

Doubtless the Commonwealth would concede that up to the time of unloading the signals and appliances along the Southern Railway the transaction was purely interstate. The work of erecting the signal masts and assembling the appliances was, however, so it says, purely an intrastate transaction. The issue, then, in another form is,—when did the interstate commerce cease? By the terms of the contract delivery was not complete

until the signals were installed, and on the facts it was certainly not foolish or unnecessary for the parties so to contract. Installation of the signals in Virginia was surely as necessary to and closely connected with the defendant's interstate business as the right to solicit orders there or to enforce payment for its signals. It was a necessary *part* of such interstate business. The General Railway Signal Company did not enter Virginia to engage in a business unconnected with its sales of signals, nor, as in *Browning v. Waycross,* in a business needlessly connected with its interstate sales. What right, then, has Virginia to prevent it completing its interstate commerce? The interstate commerce terminated when the signals were installed, and not until then.

In this industrial age vast numbers of special machines and appliances are manufactured in one State or another and sold all over the country through the solicitation of orders by traveling or resident representatives. In a great many cases installation of these appliances by the manufacturer is expedient, if not essential as in the present case. As an illustration, we have a client which manufactures at Rochester and sells throughout the United States glass lined steel tanks for the storage of beer, oils, etc. These tanks must be shipped in sections and put together and fastened to a prepared foundation after arrival at their destination. The purchaser *can* install them, but the manufacturer usually does it because it can do it better. Unless the reasoning of *Robbins v. Shelby County Taxing District, supra,* and other decisions is all wrong, the natural and convenient installation of such appliances by the manufac-

turer is a legitimate part of the interstate commerce. If it is not, the course of modern business must be changed, with enormous inconvenience and expense. In the case of the General Railway Signal Company no State but Virginia has questioned the propriety of its mode of business. We cannot believe that this court will at this day deliberately set narrow and arbitrary limits to the concept of interstate commerce and stifle the natural growth and development of the country's business.

A business may be of a somewhat exceptional character and yet be in its essential characteristics interstate commerce within the meaning of the Constitution of the United States. *Internat'l Text Book Co. v. Pigg, 217 U. S. 91, 106.* As said in *Swift & Co. v. U. S., 196 U. S. 375,* "commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business."

In addition to the cases already cited, see the reasoning of the following decisions:

Welton v. Missouri, 91 U. S. 275;
Pensacola Tel. Co. v. W. U. Tel. Co., 96 U. S. 1;
Asher v. Texas, 128 U. S. 129;
Stoutenburgh v. Hennick, 129 U. S. 141;
McCall v. California, 136 U. S. 104;
Norfolk & W. R. R. Co. v. Pennsylvania, 136 U. S. 114;
Brennan v. Titusville, 153 U. S. 289;
Morrill v. Wisconsin, 154 U. S. 626;
Dozier v. Alabama, 218 U. S. 124;
Int. Text Book Co. v. Peterson, 218 U. S. 664;

Buck Stove & Range Co. v. Vickers, 226 U. S. 205;
Crenshaw v. Arkansas, 227 U. S. 389;
Pa. R. R. Co. v. Clark Bros. Mining Co., 238 U. S. 456, 465;
Rosenberger v. Pacific Express Co., 241 U. S. 48, 52;
Adkins v. City of Richmond, 98 Va. 91;
Hovey v. De Long Hook & Eye Co., 211 N. Y. 420.

III.

The imposition of a tax upon the entire capital stock of the plaintiff in error as a condition of its doing intrastate business in connection with its interstate business is repugnant to the federal Constitution.

We have contended that the defendant was not doing business in Virginia, and that, irrespective of whether it was or not, its business was interstate commerce. For the sake of meeting the Commonwealth on its own ground, however, let it be assumed that the work done in Virginia in the installation of the defendant's signals was purely intrastate commerce.

By sections 1104 and 38a of the Virginia statutes (quoted in the statement of the case) the payment of an entrance fee based on the *maximum capital stock* of a foreign corporation is made a condition precedent to doing business in the State. In the case of the defendant the specified fee amounts to $1,000. The payment of such fee was demanded of the defendant, and was refused. For

a similar domestic corporation the organization tax would be $600 (§ 38 of Virginia Code).

This tax was attempted to be imposed upon the defendant solely on the ground that it required a license to do business in the State in order to enable it to install the signals which it had sold to the Southern Railway Company. That was the "business" which it was doing in the State, and there was no suggestion that it was doing or intended to do any business other than that. Upon the undisputed facts it is unnecessary to do more than repeat that the inability of the defendant to perform the work of installation in Virginia would have prevented or at least seriously embarrassed its confessedly interstate sale to the Southern Railway Company. Permission by Virginia, therefore, only upon a burdensome condition to put together the signals in Virginia would have a very direct effect upon the interstate commerce in which the defendant was engaged.

What amounts to a tax upon a corporation's entire business and burdens the interstate portion of it is invalid, although attempted to be imposed merely as a condition of transacting the intrastate portion. Assuming, as this court has repeatedly said, that "every case involving the validity of a tax must be decided upon its own facts," yet it is clear from the decisions that once it be evident that a State tax hampers interstate commerce such tax will not be allowed to stand.

In *Corson v. Maryland, 120 U. S. 502*, a Maryland statute required a license of every person other than the manufacturer who engaged in selling goods. A representative of a New York firm who sold by sample was indicted. The majority

of the court held the case to be governed by *Robbins v. Shelby County Taxing District, supra,* but three of the justices concurred on the following ground:

> "It is not denied that the statute of Maryland requires a nonresident merchant desiring to sell by sample in that State to pay for a license to do that business a sum to be ascertained by the amount of his stock in trade in the State where he resides and in which he has his principal place of business. This differs materially from the statute of Tennessee, which was considered in *Robbins v. Taxing District of Shelby County,* just decided, and is in its effect, as we think, a tax on commerce among the States. The charge for the privilege to the nonresident is measured by his capacity for doing business all over the United States, and without any reference to the amount done or to be done in Maryland."

In *Crutcher v. Kentucky, 141 U. S. 47,* a Kentucky statute required an agent of an express company not incorporated by the laws of the State to take out a license before he could carry on any business for his Company. The defendant was an agent of the United States Express Company, a foreign corporation doing the business ordinarily done by express companies of carrying goods back and forth within the State and also between the State and other States. The facts showed that the business done by the Company within the State was about one-fourth of the interstate business.

The court held that the State law was invalid, saying in part:

> "As a summation of the whole matter it was aptly said by the present chief justice in *Lyng v. Michigan, 135 U. S. 161, 166 (34; 150, 153)*: 'We have repeatedly held that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress.'
>
> We do not think that the difficulty is at all obviated by the fact that the express company, as incidental to its main business (which is to carry goods between different States), does also some local business by carrying goods from one point to another within the State of Kentucky. This is probably quite as much for the accommodation of the people of that State as for the advantage of the company."

On the other hand, in *Kehrer v. Stewart, 197 U. S. 60,* a tax of $200 on the business of selling meats was sustained where it was construed by the highest State court to apply only to intrastate sales. Morris & Co. of Chicago made interstate sales and also shipped meat products into the State

for sale in the ordinary course of trade. The court said:

> "It was admitted by the supreme court of Georgia, in its opinion, and by both parties hereto, that a tax upon the seller of goods is a tax upon the goods themselves (*Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347*), and that a tax upon goods sold in another State, delivered to a common carrier, and consigned to the purchaser in the State of Georgia, was an illegal interference with interstate commerce. *Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; Norfolk & W. R. Co. v. Sims, 191 U. S. 441, 48 L. ed. 254, 24 Sup. Ct. Rep. 151; Stone v. State, 117 Ga. 292, 43 S. E. 740.* It was therefore held that the tax, so far as applied to meats sold in Chicago, and shipped to the petitioner in Georgia for distribution, could not be supported; but that so far as the petitioner was engaged in the business of selling directly to customers in Atlanta, he was engaged in carrying on an independent business as a wholesale dealer, and was liable to the tax."

In *W. U. Telegraph Co. v. Kansas, 216 U. S. 1,* the State of Kansas attempted to oust the Telegraph Company from doing any intrastate business because it refused to pay a qualification tax of a certain percentage of its authorized capital

stock. Mr. Justice Harlan summed up the position of the Telegraph Company as follows:

> "The contentions of the company, to which particular attention will be directed, are, in substance, that the requirement that it pay, for the benefit of the permanent school fund of the State, *a given per cent of its authorized capital,* wherever and however employed, as a *condition* of its right to continue to do domestic business in Kansas, is a regulation which, by its necessary operation, directly burdens or embarrasses interstate commerce, and therefore is illegal under the commerce clause of the Constitution; further, that such a requirement involves the taxation not only of the company's interstate business everywhere, but equally the property employed by it beyond the limits of the State,—a thing which could not be done consistently with the due process of law enjoined by the 14th Amendment."

After discussing related prior decisions the court said:

> "We are aware of no decision by this court holding that a State may, by any device or in any way, whether by a license tax in the form of a 'fee,' or otherwise, burden the interstate business of a corporation of another State, although the State may tax the corporation's property regularly or permanently located within its limits, where the ascertainment of the amount assessed is made 'depend-

ent *in fact* on the value of its property situated within the State.' *Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 696, 39 L. ed. 311, 315, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; Leloup v. Mobile, 127 U. S. 640, 649, 32 L. ed. 311, 314, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380.* On the contrary, it is to be deduced from the adjudged cases that a corporation of one State, authorized by its charter to engage in lawful commerce among the States, may not be prevented by another State from coming into its limits for all the legitimate purposes of such commerce. It may go into the State without obtaining a license from it for the purposes of its interstate business, and without liability to taxation there *on account of such business.*

But it is said that none of the authorities cited are pertinent to the present case, because the State expressly disclaims any purpose by the statute in question to obstruct or embarrass interstate commerce, but seeks only to prevent the telegraph company from entering the field of domestic business in Kansas without its consent, and without conforming to the requirements of its statute. But the disavowal by the State of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed, or as to the unconstitutionality of the statute, as shown by its necessary operation upon interstate commerce. If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate

> commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things. Such is an established rule of constitutional construction, as the adjudged cases abundantly show."

In *Pullman Co. v. Kansas, 216 U. S. 56,* the State of Kansas similarly attempted to oust the Pullman Company from doing a local business because of its refusal to pay a qualification tax of a percentage of its capital stock. The court held:

> "That the requirement that the company, as a condition of its right to do intrastate business in Kansas, should, in the form of a fee, pay to the State a specified per cent of its authorized capital, was a violation of the Constitution of the United States, in that such a single fee, based as it was on all the property interests, and business of the company, within and out of the State, was, in effect, a tax both on the interstate business of that company, and on its property outside of Kansas, and compelled the company, in order that it might do local business in Kansas in connection with its interstate business, to waive its constitutional exemption from State taxation on its interstate business and on its property outside of the State, and contribute from its capital to the support of the public schools of Kansas."

In *Ludwig v. W. U. Telegraph Co., 216 U. S. 146,* the Telegraph Company sought a decree that an Arkansas statute conditioning its right to do intrastate business upon the payment of a qualification tax of a percentage of its capital stock, and fining it upon failure so to do, was unconstitutional. The court held:

> "The case cannot be distinguished in principle from *Western U. Teleg. Co. v. Kansas* and *Pullman Co. v. Kansas,* recently decided (*216 U. S. 1, 56, ante, 355, 378, 30 Sup. Ct. Rep. 190, 232*). The difference in the wording of the Kansas and Arkansas statutes, cannot take the present case out of the ruling of the former cases. On the authority of the Kansas cases, and for the reasons stated in the opinions therein, we hold the statute in question to be unconstitutional and void, as illegally burdening interstate commerce and imposing a tax on property beyond the jurisdiction of the State."

In *A. T. & S. F. Ry. Co. v. O'Connor, 223 U. S. 280,* a Colorado tax of 2 cents on each thousand dollars of stock of a Kansas railway company was held invalid under the commerce and due process of law clauses of the federal Constitution, even though the State court construed the forfeiture of the right to do business, provided in default of payment, to be limited to intrastate business.

In *Baltic Mining Co. v. Massachusetts, 231 U. S. 68,* the court upheld a State excise tax upon intrastate business clearly separable from interstate business of the complainant corporations. The

Baltic Mining Company maintained an office in the State for the transaction of all its financial affairs and the White Dental Company made intrastate sales of its products. The court said:

> "That the State may impose a tax upon a corporation, foreign or domestic, for the privilege of doing business within its borders, is undoubted; and such has long been the legislative policy of the commonwealth of Massachusetts, as appears from the history of legislation set forth in the opinions in the cases last cited. Construing the act in question, the supreme judicial court of Massachusetts has held that it does not apply to corporations engaged in railroad, telegraph, telephone, etc., business, which are taxed on another plan under the provisions of the statute. It is held not to apply to corporations whose business is interstate commerce, or who carry on interstate and intrastate business in such close connection that the intrastate business cannot be abandoned without serious impairment of the interstate business of the corporation. And the statute, it is held, does not apply to corporations which have places of business for the transaction solely of interstate commerce.
>
> . . .
>
> In the cases at bar the business for which the companies are chartered is not, of itself, commerce. True it is that their products are sold and shipped in interstate commerce, and to that extent they are engaged in the business of carrying on interstate commerce, and are entitled to the protection of the federal Con-

> stitution against laws burdening commerce of that character. Interstate commerce of all kinds is within the protection of the Constitution of the United States, and it is not within the authority of a State to tax it by burdensome laws. From the statement of facts it is apparent, however, that each of the corporations in question is carrying on a purely local and domestic business, quite separate from its interstate transactions. That local and domestic business, for the privilege of doing which the State has imposed a tax, is real and substantial, and not so connected with interstate commerce as to render a tax upon it a burden upon the interstate business of the companies involved."

So, in *St. Louis S. W. Ry. Co. v. Arkansas, 235 U. S. 350,* an Arkansas franchise tax based on the proportion of corporate capital employed within the State was held valid. The Arkansas Supreme Court had said, as quoted by the Supreme Court:

> "Our State has fixed a franchise tax based solely 'upon the proportion of outstanding capital stock of corporations represented by property owned and used in business transacted in this State.' The act in question seems to have been drawn with great care and with the evident purpose to exclude any contention that the tax was made upon interstate commerce. The framers of the act evidently considered the cases of *Ludwig v. Western U. Teleg. Co., 216 U. S. 146, 54 L. ed. 423, 30 Sup. Ct. Rep. 280,* and *Western U. Teleg.*

Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190, and therefore intended to pass an act that would not be contrary to the principles therein announced. We think it has done so. It will be noted in the *Ludwig case,* the statute required a foreign corporation engaged in interstate commerce to pay as a license tax for doing intrastate business, a given amount on its capital stock, whether employed within the State or elsewhere, and the court held that on the authority of the Kansas case, the statute in question was unconstitutional and void because it directly burdened interstate commerce and imposed a tax on property beyond the jurisdiction of the State."

In *Kansas City, F. S. & M. Ry. Co. v. Botkin, 240 U. S. 227,* a statute of Kansas required every domestic corporation to pay an annual privilege tax based on the amount of its paid-up stock. A domestic railroad company with lines in other States protested. The court held the statute valid, saying:

"It must be assumed, in accordance with repeated decisions, that the State cannot lay a tax on interstate commerce 'in any form,' by imposing it either upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts as such derived from it. [Citing cases.] And, further, in determining whether a tax has such a direct relation to interstate commerce as to be an exercise of power prohibited by the com-

merce clause, our decision must regard the substance of the exaction,—its operation and effect as enforced,—and cannot depend upon the manner in which the taxing scheme has been characterized. [Citing cases.]

Examining the statute in the present case, we see no reason to doubt the accuracy of the description of the tax by the State court. We take it to be simply a tax on the privilege of being a corporation,—on the primary corporate franchise granted by the State."

There is a wide difference between a State taxing a domestic corporation on the basis of the capital stock which the State itself has permitted to be issued and the benefits of which the corporation enjoys by State grant, however and wherever the corporation may employ its capital, and a State taxing a foreign corporation on the basis of its entire capital stock, with the authorization and amount of which the State has no concern and only a fraction of which the corporation employs in the State, because the corporation may conveniently or must necessarily do some intrastate business in connection with its interstate business. The fair and lawful way to tax such a foreign corporation is on the proportion of its capital stock represented by intrastate business, as in *Lusk v. Botkin, 240 U. S. 236,* concurrently decided.

On the other hand, as we have seen in the Baltic Mining Company case, if a foreign corporation desires to do in a State business which is readily separable and distinct from its interstate business, then it must pay for the privilege whatever the State cares to exact. This was the situation in

Pick & Co. v. Jordan, 244 U. S. 647, where an Illinois corporation maintained a branch store in California for the sale of its products there.

See also *Leloup v. Port of Mobile, 127 U. S. 640;*
Postal Tel. Cable Co. v. Adams, 155 U. S. 688;
People v. Roberts, 171 U. S. 658;
Allen v. Pullman's Palace Car Co., 191 U. S. 171;
Barrett v. New York, 232 U. S. 14.

It seems evident from the decisions: (1) that a State tax based on the proportion of capital employed in intrastate business done in the State by a foreign corporation is valid; (2) that a State tax based on the entire capital stock of a foreign corporation is valid if the corporation desires to do intrastate business readily separable from its interstate business; and (3) that a State tax based on the entire capital stock of a foreign corporation is invalid if the corporation does only intrastate business incidental or necessary to its interstate business. In situations (1) and (2) interstate commerce is not burdened, because the foreign corporation either pays a trifling tax for the incidental intrastate business done, under (1), or refrains from intrastate business and goes on unmolested with its interstate business, under (2). But in situation (3) such a tax actually hampers interstate commerce, because the corporation must submit in such States to a tax out of all proportion to intrastate business done, or must transact less

conveniently or entirely cease its interstate commerce.

In *St. Louis S. W. Ry. Co. v. Arkansas, supra,* the tax was apportioned, as in (1), and was accordingly proper. In *Baltic Mining Co. v. Massachusetts, supra,* the intrastate business was distinct and readily separable and could be taxed at the whim of the State, as in (2). In the cases in 216 U. S. the intrastate business was closely connected with the interstate and either abandoning it or submitting to unjust taxation would seriously hamper the interstate commerce, as in (3).

It is not difficult to determine in which class the present case belongs. The General Railway Signal Company was not conducting a separate intrastate business in the sale of railway signals or otherwise. It was completing single interstate transactions, involving products manufactured and sold in another State but incapable of assembly there. Even if it had not been obliged to do the installation work to effect the sale,—as was the fact,—it was proper for it to conduct its interstate business in any reasonable, convenient manner, free from burdensome exactions alleged to be aimed at the incidental intrastate part of it. There is absolutely nothing in common between the intrastate business conducted by foreign corporations where such taxes have been upheld and the assumed intrastate business done in Virginia by the plaintiff in error.

In *Marconi Wireless Tel. Co. v. Commonwealth, 106 N. E. (Mass.) 310,* several foreign corporations petitioned for the return of license taxes on the ground that, although they maintained offices in Massachusetts, their business was interstate

commerce. In discussing the general rule applicable to the solution of the different situations the court said:

> "It is apparent from this review of decisions that the interstate commerce regulation which is under the exclusive control of Congress and which cannot be affected by any discriminatory State law, includes not merely transportation but the other inherently necessary incidents of purchase and sale of goods. Nor is it of decisive consequence in this connection where the contract is made or where the title passes.
>
> The test is whether the foreign corporation transacts domestic business substantial in its essence and not by comparison, and reasonably susceptible of separation from its interstate commerce. If it does, the State can fix its own terms so far as license fee is concerned."

With reference to the Pocahontas Fuel Company the court said:

> "That which this company does in Massachusetts seems to be rationally connected with interstate commerce. The sole business which this company appears to carry on is 'commerce . . . among the several States' as that phrase has been defined in judgments by which we are bound. The keeping of an office and a local bank account and the employment of a stenographer are incidental instrumentalities reasonably necessary to the conduct of this interstate commerce, and hence inseparable from it."

Concerning the Lanston Monotype Company the court said:

> "This distinction is not whether a profit is made by the conjoining and a loss suffered by separating the intrastate and the interstate commerce, but whether the nature of the business is such that the company is free to renounce the domestic business if it chooses and still conduct its interstate commerce."

Of course, it is hard to find cases paralleling the present so far as the point under discussion is concerned, because the plaintiff in error was actually not doing business in Virginia and its business was exclusively interstate commerce. It did not have agents in Virginia prepared to solicit or accept new business, nor did it transact in Virginia other business separate from the interstate transaction which brought it there. It did none of the things which the decisions cited point out as constituting intrastate business.

If the interstate business and the intrastate business of a foreign corporation are readily separable, it should be just as possible, aside from the legal questions, to discontinue the interstate business without seriously affecting the intrastate business, as to terminate the intrastate business and continue the interstate. Is it conceivable that any business of the plaintiff in error would remain in Virginia if its interstate business ceased?

Assuming, however, as we are now doing, that the defendant was engaged in intrastate business in its installation work, yet as we have seen the State could not impose as a condition of its doing

such business, closely and inseparably connected as it was with its interstate business, which admittedly the State could not prevent, a tax upon the defendant's entire capital stock. As above indicated, a tax measured by the proportion of the defendant's capital stock represented by property owned and used in the State would have been proper, which confirms the validity of the defendant's contention that it was not doing business in Virginia, for the proportion of the defendant's capital stock represented by property owned and used in the State is now and always has been zero. We perceive no escape from the conclusion that if the license tax statute of Virginia be construed to apply to the plaintiff in error, it is unconstitutional and void.

IV.

In the installation alone of its signals upon the Southern Railway the plaintiff in error was engaged in interstate commerce.

It is impossible actually to subdivide the transaction of the sale of railway signals with which we are concerned; but let us further extend our argumentative acquiescence in the Commonwealth's views and assume that the work of installation was performed by an entity separate from the defendant, although possessing all its highly technical and intimate knowledge of the intricacies of the signal system sold by the defendant, such an entity as the Railway Company would have been if it had a special signal organization of its own.

Even so, we incline to believe that if the Railway Company or other entity had undertaken the work of installation, it would have been engaged in interstate commerce.

There is a marked difference between the installation of machinery in a manufacturing plant in Richmond and the installation of block signals along the Southern Railway in Virginia and in other States. In the one case, the machinery after sale and installation ceases to be the subject of interstate commerce and becomes an instrument of intrastate business. In the other case, the railway signals are part of an instrumentality of interstate commerce, an interstate railroad, and their installation is a work of maintenance or betterment.

Whoever was engaged in installing the signals in the present case, partly to replace old signals, was engaged in maintaining and improving an instrumentality of interstate commerce, and was consequently engaged in interstate commerce. If the employees were engaged in interstate commerce, naturally the employer was likewise.

In *Pedersen v. Delaware, Lackawanna & Western Railroad Company, 229 U. S. 146,* an employee of the railroad carrying bolts which were to be used in altering and repairing a bridge had been injured by an intrastate passenger train, no warning of the approach of which had been given by the engineer. The action was to recover under the federal Employers' Liability Act. The court held that the plaintiff had been engaged in interstate commerce and could recover, saying in part:

"That the defendant was engaged in inter-

state commerce is conceded; and so we are only concerned with the nature of the work in which the plaintiff was employed at the time of his injury. Among the questions which naturally arise in this connection are these: Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier? The answers are obvious. Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars; and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition, and efficiency of the commerce depends in large measure upon this being done. Indeed, the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct 'any defect or insufficiency . . . in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment' used in interstate commerce. But independently of the statute, we are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it."

See further

St. Louis, San Francisco & Texas Ry. Co. v. Seale, 229 U. S. 156;
N. C. R. R. Co. v. Zachary, 232 U. S. 248;
Louisville & Nashville R. R. Co. v. Parker, 242 U. S. 13;
Southern Ry. Co. v. Puckett, 244 U. S. 571;
Northern Pacific Ry. Co. v. Maerkl, 198 Fed. 1;
Thomson v. C. & P. S. Ry. Co., 205 Fed. 203;
Law v. Ill. Cent. R. R. Co., 208 Fed. 869.
Cf. Southern Ry. Co. v. United States, 222 U. S. 20;
Mondou v. N. Y., N. H. & H. R. R. Co., 223 U. S. 1.

But, the Commonwealth will say, the opinion in the Pedersen case expressly states:

> "Of course, we are not here concerned with the construction of tracks, bridges, engines or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such."

That is true. A workman engaged in the laying out of a new railroad or the construction of a bridge in connection therewith is not engaged in

interstate commerce. The commerce does not begin until the breath of life is infused into the completed work, until operation is begun. But the Southern Railway was a road in actual operation. The installation of the signals was a work of maintenance, done in pursuance of the duty of the carrier to correct any insufficiency in its appliances or other equipment. The signal workers were not building a railroad: they were altering and repairing, as in the Pedersen case, a living, pulsating instrumentality of interstate commerce.

The manufacture of the bolt involved in the Pedersen case was not interstate commerce, but its affixing to an instrumentality of interstate commerce was directly and intimately connected with it. The same rule applies to the signals here in question.

In *Eng v. Southern Pacific Co., 210 Fed. 92,* the plaintiff was injured while building a new office in a freight shed of the defendant railway company. The court held the injury to come within the federal Employers' Liability Act, saying:

> "The principle seems to be that one employed at the time of his injury in the use of or maintaining in proper condition any instrumentality or appliance used by the carrier in interstate commerce comes within the statute, although such instrumentality or appliance may also be used for intrastate business. Now, freight sheds, depots, and warehouses or other facilities provided and used by a carrier for receiving, handling, and discharging interstate freight are, I take it, in-

strumentalities used in interstate commerce under the doctrine of the cases, and are so closely connected therewith as to be a part thereof for the purposes of the federal Employers' Liability Act.

Claim is made that, since plaintiff at the time of his injury was at work in framing a new office in the freight shed, he is in the position of one employed to construct buildings, tracks, engines, or cars, which have not yet become instrumentalities of commerce. But the freight shed in question was being so used by the defendant in its interstate business. The work in which the plaintiff was engaged, as appears from the complaint, was in the nature of the repair of an instrumentality so used, and not the construction of new work."

See also *Chrosciel v. N. Y. C. & H. R. R. R. Co., 174 App. Div. (N. Y.) 175.*

Whoever does it, the work of installing signals through different States on interstate lines is indissolubly connected with interstate commerce. To hold otherwise would be to permit State exactions to hamper enlightened provision for the fullest protection of life and property. To hold otherwise would be to permit any State capriciously to prevent the installation of a uniform system of signals along interstate railways, beyond question a matter of national concern.

The Urgent Deficiency Act of October 22, 1913, contained an appropriation to enable the Interstate Commerce Commission "to investigate and report

in regard to the use and necessity for block signal systems," and in the thirtieth annual report of the Interstate Commerce Commission it is said: "The Commission has repeatedly urged enactment of a law by the Congress which would require railroad companies to adopt the block system on all their passenger-carrying lines."

Cf. Haskell v. Cowham, 187 Fed. 403, and *California v. C. P. R. R. Co., 127 U. S. 1.*

CONCLUSION.

The judgment of the Supreme Court of Appeals of Virginia should be reversed and the fine imposed by the State Corporation Commission remitted.

December 1, 1917.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1917

No. 177

GENERAL RAILWAY SIGNAL COMPANY,
PLAINTIFF IN ERROR.

v.

COMMONWEALTH OF VIRGINIA AT THE RELATION OF THE STATE CORPORATION COMMISSION,
DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

BRIEF ON BEHALF OF THE COMMONWEALTH OF VIRGINIA.

J. D. HANK, JR. *Attorney General of Virginia.*

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BRIEF ON BEHALF OF THE COMMONWEALTH OF VIRGINIA.

STATEMENT OF THE CASE.

This case was first passed upon by the State Corporation Commission of the State of Virginia, and from the order entered by that Commission, the plaintiff in error appealed

to the Supreme Court of Appeals of Virginia, and the case comes here upon a writ of error to the final decision of that court. The facts of the case were so clearly and fully stated in the opinion delivered by the learned Chairman of the Corporation Commission in rendering his decision that it was adopted by the Supreme Court of Appeals of Virginia as the true statement of facts in the case and we feel that we cannot more succinctly and clearly state the facts than to adopt the statement contained in the decision of the Supreme Court of Appeals of Virginia, which is as follows (R. p. 47):

> "This is a proceeding instituted under section 1105 of the Code, charging the General Railway Signal Company with doing business within the State of Virginia without having complied with section 1104 of the Code, requiring every foreign corporation, before doing business in this State, to present to this Commission written powers of attorney, appointing some person residing in this State its agent upon whom process against the corporation may be served, two duly authenticated copies of its charter and a certificate from the auditor of Public Accounts showing the payment of the fee required by law of such foreign corporation.
>
> "The defendant is a corporation of the State of New York, having an authorized capital of $5,000,000. Its principal office and factory is at Rochester, N. Y., where it owns and operates a large manufacturing plant devoted to the manufacture of materials chiefly used in the construction of railway signals which it sells and constructs all over the world. It has a branch factory at Montreal, Canada, and maintains branch offices in New York City, Chicago, and San Francisco.

"By contract dated the fifth day of May, 1914, with the Southern Railway Company, the defendant agreed to furnish certain materials, supplies, machinery, devices and equipment, as well as all necessary labor, and to install, erect, and put in place certain signals and apparatus shown on the plans and described in the specifications, from Amherst to Whittles, Virginia, fifty-eight miles, and to 'complete the entire system and turn same over to the railway company as a finished job,' subject to inspection and acceptance, for $85,597. Similar contracts had been previously made and fully performed, one dated September 6, 1911, covering the lines of the Southern Railway in Virginia from Monroe to Montview, Virginia, thirteen miles, for $16,015, and one dated July 18, 1913, from Orange to Seminary, Virginia, seventy-six miles, for $112,428. The aggregate distance in this State covered by these contracts being 147 miles, and the total consideration being $214,040.

"The purpose of these signals is to promote safety of railway operation and they operate automatically.

"In order to construct these signals as required by the contract it was necessary to employ in this State labor, skilled and unskilled, to dig ditches in which conduits for the wires are placed, to construct concrete foundations, and to paint the completed structures. The completed structures are along the side of the railway track, about two miles apart, and are twenty-two or twenty-three feet high. In the language of the witness, Moffett: 'It is necessary to erect the signal mechanism, the masts supporting the mechanism, the houses for protecting the relays, reactors, re-actants, and other similar electrical devices protected from the weather, then the transformers, high tension line arrestors and low tension line ar-

restors.' The completed structures are permanently attached to the freehold upon concrete bases.

"While counsel for the defendant insists that the main object of the transaction was to sell the materials which it manufactures in the State of New York, the contract and the letters leading up to the contract plainly show (unless the less includes the greater) that the main purposes expressed was to erect, install and complete the signal system in Virginia, and that the furnishing of the material was the necessary and preliminary incident of the contract."

* * *

As counsel for the plaintiff in error in this court still insists that the main object of the transaction was to sell the materials which it manufactures, it is well to set out certain pertinent provisions of the contract under which the business in question was carried on in the State of Virginia. It appears that each of the contracts mentioned above as having been performed in the State of Virginia were entered into practically in the same manner and under the same terms and provisions, and it will therefore only be necessary to quote from one of such contracts in order to ascertain whether or not it is true that the defendant's real business was to sell its material; or whether it was to turn over to the Southern Railway Company a system of signals in Virginia. The proposal for the installation of the signal system "Amherst to Whittles" provides as follows (R. pp. 25-26):

"Southern Railway Company, Mr. C. R. Craig, Purchasing Agent, Washington, D. C.

Dear Sir: Please find herewith proposals for which we recently received request from you for bids: * * *

AMHERST TO WHITTLES PROPOSAL.

"Proposal includes the furnishing of new signals, annunciators, locks at interlocking plants shown on plants and referred to in specifications, together with new signals and indicators and the necessary labor for applying same.

"On that portion of the work between Monroe and Mountview where there is now installed a system of direct current signaling we have figured on furnishing complete in place new alternating current apparatus as though there were no signaling now installed. The direct material so replaced to be the property of the Southern Railway Company and to be removed by their forces. If desired we will use as much of this material as possible in the new installation and allow credit to the Southern Railway Company for same satisfactory to both parties.

"We have made up no detailed estimate as to the cost of direct current installation in place of alternating current covered in our proposals, but would state that the cost of a direct current installation will be approximately the same as the alternating current on which we have named you prices.

Very truly yours,
GENERAL RALWAY SIGNAL COMPANY,
Per M. R. BRINEY, Resident Manager."

And the letter accompanying this proposal reading as follows (R. pp. 26-27):

"May 1, 1914.

"Southern Railway Company, Mr. C. R. Craig, Purchasing Agent, Washington, D. C.

"Dear Sir: Referring to your request that we submit to you a proposal covering a system of Alternating Current Signaling on your lines between Amherst and Whittles, Virginia.

"I beg to advise you that we will furnish materials and erect complete a system of alternating current signals on your line between Amherst and Whittles, Virginia, consisting of eighty-two signals, eighty-two track circuits, one hundred twenty-two protected switches, power apparatus for three power plants, revision of two interlocking plants, one at Mountview, the other at Leftwich, together with all other material and labor required for a complete installation as called for on your plan S. D. 1743, dated February 20, 1914, latest revision, April 10, 1914, for the sum of $85,597.

"Payment to be made as specified in the Southern Railway's form of agreement received with your request for bids.

"All materials and labor required for the complete installation to conform with the requirements as set forth in your specifications, entitled Specification for Alternating Current Automatic Signaling System between Amherst and Whittles, Virginia, together with drawings attached thereto.

"If awarded your contract, we will execute the Southern Railway's form of agreement accompanying specifications and plans referred to above.

Very truly yours,

GENERAL RAILWAY SIGNAL COMPANY,
Per M. R. BRINEY, Resident Manager."

The contract under which the signal system in question was installed provides that the plaintiff in error, who is styled "contractor" in the contract, covenants and agrees (R. pp. 29-30):

> "1. That the contractor will furnish all such materials, supplies, machinery, devices and equipment (except such things which are to be furnished by the Railway Company, as mentioned in the specifications), as well as all such labor, skilled and unskilled, as may be necessary therefor, and will install, erect and put in place the said signals and apparatus as shown upon plan SD-1743 revised April 10, 1914, and more fully described in the specifications of the Railway Company, dated April 10, 1914, hereto attached and made a part hereof marked "Exhibit 'A'," and will complete the entire system and turn the same over to the Railway Company as a finished job, subject to inspection and acceptance by its Chief Engineer of Maintenance of Way & Structures, or his duly authorized representative, within not more than six (6) months from the date of these presents; all of said work to be done in strict accordance with the plans and specifications which are hereunto annexed and made a part of these presents as the same are written and prepared, unless and except the same are modified as herein provided. * * *
>
> 5. That the contractor shall indemnify and save the Railway Company harmless from and against all loss or damage, claims, suits, recoveries, judgments, costs or expenses, which may accrue or may be made, had, brought or recovered from or against the Railway Company by reason or on account of the work, material, tools, implements, machinery, fix-

tures, or anything used in or about the work to be performed under this contract, being infringement of Letters Patent issued by the United States or any foreign country.

6. That it, the Contractor, will assume all responsibility for any damage which will happen to the work provided for in this contract from fire, floods, storms or any other cause whatsoever, prior to the final completion and acceptance thereof. * * *

8. That the Contractor will, and hereby does assume as a general Contractor, all the risks of damage to property or personal injury done by it or its servants or employees in the course of the work undertaken, and, moreover, agrees to indemnify and save harmless the Railway Company against any and all claims and liabilities arising out of any risks accruing to the Contractor or to any agents, servants or employees of the Contractor incident to the work undertaken to be done by the Contractor hereunder, however the same may accrue." * * *

It is thus plainly seen that however the plaintiff in error may have considered the contract, it was not a contract to sell material but that the main purpose as set out in the correspondence and contracts between the plaintiff in error and the Southern Railway Company, was to erect, install and complete their signal system in Virginia, and that the furnishing of material, as said by the Supreme Court of Appeals of Virginia, "was the necessary and preliminary incident of the contract." The form of the proposal, letter and contract, above set out, appears to be identical for use in all the contracts performed in the State of Virginia (R. p. 10).

It is also pertinent to note that although the plaintiff in error did install and erect the signal in this instance, that it is not unusual for contracts to be entered into providing simply for the sale of material by the company, the construction being done by the purchaser. In fact this has been done in Virginia as is shown by the testimony of a witness introduced on behalf of the plaintiff in error by the name of Moffett, who testified that the only contract which the plaintiff in error had made in Virginia for installation of the signal system was with the Southern Railway, but that the plaintiff in error also sold material to other companies (R. p. 10).

As one of the conditions under which a foreign corporation is allowed to do a local business in Virginia is that it shall appoint some person residing in the State upon whom all legal process against the corporation may be served, it is proper to note that, in the course of construction of one of the systems for the Southern Railway Company in Virginia, one of the employees of the plaintiff in error was injured and when, after demand for reparation and refusal, suit was instituted in Virginia, process could not be served (R. p. 20).

Under this state of facts, it was held by the Supreme Court of Appeals of Virginia that the plaintiff in error was doing business in Virginia within the meaning of sections 1104 and 1105 of Virginia Code quoted at length in the brief of counsel for plaintiff in error at page 6.

The Issue in the Case.

The effect of the statute in question is to affix certain conditions to the privileges granted foreign corporations to do business in Virginia. The requirements of the statute in question are conditions precedent to the right of the foreign corporation to do business in that State.

It must be regarded as finally settled, by frequent decisions of this court that a State may impose such conditions upon permitting a foreign corporation to do business within its limits, as it may deem expedient. Only two exceptions or qualifications have ever been attached to this doctrine in all the numerous adjudications in which the subject has been considered. One of these qualifications is that a State court cannot exclude from its limits a corporation in the employ of the Federal government. The other qualification is that the State cannot exclude from its limits a corporation engaged in foreign or interstate commerce.

Paul v. *Virginia*, 8 Wall. 168, 19 L. Ed. 357 (1868).

Horn Silver Mining Co. v. *New York*, 143 U. S. 305, 36 L. Ed. 164 (1892).

New York v. *Roberts*, 171 U. S. 658, 43 L. Ed. 324 (1898).

Pembina Con. Etc. Co. v. *Pa.*, 125 U. S. 181, 31 L. Ed. 650 (1888).

Pullman Co. v. *Kansas*, 216 U. S. 56, 54 L. Ed. 378, 385 (1909) (Concurring opinion of Mr. Justice White).

Baltic Mining Co. v. *Mass.*, 231 U. S. 68, 58 L. Ed. 127 (1913).

As the plaintiff in error is neither in the employ of the Federal government nor engaged in foreign commerce in Virginia, there can be no question of the right of that State to affix to the privilege of allowing the plaintiff in error to do business within its limits the conditions provided by the statute in question, and to require the plaintiff in error to comply with these conditions as a prequisite to doing business in that State, unless the business done in the State is interstate business, or, to be more correct, unless the business done in the State is such a business as is protected by that provision of the Constitution which gives to Congress the right to regulate commerce between the States. We

say "to be more correct" for it was pointed out by the present Chief Justice of this court, in delivering the opinion in *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500, 521, 48 L. Ed. 538, 547 (1903) that, though goods may not have completely lost their character as interstate commerce, yet they may have been so dealt with that a tax on them would not amount to a regulation of interstate commerce in the sense of the Federal Constitution, although its levy may remotely and indirectly affect interstate commerce. So, the State of Virginia can impose such conditions as is deemed expedient on the plaintiff in error as a prerequisite to permitting it to do in that State a business that is not protected by the commerce clause of the Federal Constitution, though such business may not have completely lost its interstate charcter. In other words, is the business which the State of Virginia forbids the plaintiff in error from doing, without complying with certain conditions, such a business as is protected by that clause of the Constitution of the United States which provides that Congress shall regulate commerce between the States? If not, then the State can forbid such business from being conducted or place such conditions on the privilege of doing such business within its borders as it may deem expedient.

In laying down the above principles we recognize the limitations on this rule laid down in *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, 54 L. Ed. 355 (1910); *Pullman Co.* v. *Kansas*, 216 U. S. 56, 54 L. Ed. 378 (1910) and subsequent cases but, as this phase of the question will be discussed later in dealing with the amount of tax that must be paid in order for foreign corporations to engage in intrastate business in Virginia, it will not now be necessary to consider them. Furthermore no question of discrimination against foreign corporations is at issue, for the whole question is as to the right to require the plaintiff in error to ful-

fill the condition of the statute in question as a condition precedent to its right to do business in Virginia.

It is proper to note, however, that sections 37 and 38 of the same Tax Bill as section 38a quoted at page 7 of brief of counsel for plaintiff in error provides for a tax upon domestic corporations based upon their maximum capital stock in the same manner as is provided in section 38a for foreign corporations.

Thus section 37 provides that every domestic corporation authorized by its charter to exercise the powers of a transportation and transmission company, shall pay a fee into the treasury of the State of Virginia to be ascertained and fixed as follows:

> "For a company whose maximum capital stock is five thousand dollars or under, twenty-five dollars; for a company whose capital stock is over five thousand dollars, and not to exceed ten thousand dollars, fifty dollars; over ten thousand and not to exceed twenty-five thousand dollars, seventy-five dollars; over twenty-five thousand dollars, and not to exceed fifty thousand dollars, one hundred and twenty-five dollars; over fifty thousand dollars, and not to exceed one hundred thousand dollars, two hundred dollars; over one hundred thousand dollars, and not to exceed three hundred thousand dollars, three hundred and twenty-five dollars; over three hundred thousand dollars, and not to exceed five hundred thousand dollars, four hundred and fifty dollars; over five hundred thousand dollars, and not to exceed eight hundred thousand dollars, five hundred and seventy-five dollars; over eight hundred thousand dollars, and not to exceed one million dollars, seven hundred and

> fifty dollars; over one million dollars, and not to exceed ten million dollars, one thousand dollars; * * *
>
> For the purpose of this act the amount to which the company is authorized by the terms of its charter to increase its capital stock shall be considered its maximum capital stock."

Section 38 provides that every domestic corporation, other than such as are described in the last preceding section, shall, upon the granting of its charter, pay a fee into the treasury of the State of Virginia to be ascertained and fixed as follows:

> "For a company whose maximum authorized capital stock is fifty thousand dollars or less, ten dollars; for a company whose maximum authorized capital stock is over fifty thousand dollars and less than three million, twenty cents for each one thousand dollars or fraction thereof; for a company whose maximum authorized capital stock is three million dollars or more, six hundred dollars; * * *"

Recognizing these principles, and also that no question of discrimination against interstate commerce is involved, the specifications of error to this court are confined to four assignments, namely (Brief of counsel for plaintiff in error, page 8):

> "1. The courts below erred in holding that the General Railway Signal Company had violated Sec. 1104 of the Code of Virginia, for the reason that the General Railway Signal Company was not doing business in Virginia.

2. The courts below erred in holding that the General Railway Signal Company had violated Sec. 1104 of the Code of Virginia and in fining it for such alleged violation, for the reason that the sale of the General Railway Signal Company's railway signals to the Southern Railway Company, including their installation upon its railroad, was a transaction of interstate commerce and protected by the commerce clause of the Federal Constitution.

3. The courts below erred in holding that the General Railway Signal Company had violated Sec. 1104 of the Code of Virginia and in fining it for such alleged violation, for the reason that the imposition of a tax by the Virginia statutes upon the General Railway Signal Company's entire capital stock as a condition of its doing intrastate business in connection with its interstate business was repugnant to the Federal Constitution.

4. The courts below erred in holding that the General Railway Signal Company had violated Sec. 1104 of the Code of Virginia and in fining it for such alleged violation, for the reason that in the installation alone of its railway signals upon the Southern Railway the General Railway Signal Company was engaged in interstate commerce."

The whole issue is the nature of the operations and the character of the business engaged in by the plaintiff in error in the State of Virginia. If its character was purely local, then the power of the State to exclude it was absolute and the State had a right to impose the conditions contained in the statute in question.

In the discussion of this issue, we shall not attempt to review in detail the some two hundred cases cited by counsel

for the plaintiff in error in their brief as we cannot believe it would assist in arriving at the proper solution of the question at bar, but shall confine ourselves to a consideration of those principles and cases bearing immediately upon the matter in issue, referring to some of the better considered decisions of the State Courts; and discussing some of the many cases cited in the brief of counsel for plaintiff in error.

ARGUMENT

I.

THE PLAINTIFF IN ERROR WAS ENGAGED IN DOING BUSINESS IN VIRGINIA WITHIN THE MEANING OF THE VIRGINIA STATUTES IN QUESTION.

(A). This Court will be Bound by the Construction Placed on the Statutes in Question by the Supreme Court of Appeals of Virginia.

Section 157 of the Constitution of Virginia provides:

> "Provision shall be made by general laws for the payment of a fee to the Commonwealth by every domestic corporation, upon the granting, amendment or extension of its charter, and by every foreign corporation upon obtaining a license to do business in this State as specified in this section; and also for the payment, by every domestic corporation, and foreign corporation doing business in this State, or an annual registration fee of not less than five dollars nor more than twenty-five dollars, which shall be irrespective of any specific license, or other, tax imposed by law

upon such company for the privilege of carrying on its business in this State, or upon its franchise or property; and for the making, by every such corporation (at the time of paying such annual registration fee), of such report to the State Corporation Commission, of the status, business or condition of such corporation, as the General Assembly may prescribe. *No foreign corporation shall have authority to do business in this State until it shall have first obtained from the commission a license to do business in this State, upon such terms and conditions as may be prescribed by law.* The failure by any corporation for two successive years to pay its annual registration fee, or to make its said annual reports, shall, when such failure shall have continued for ninety days after the expiration of such two years, operate as a revocation and annulment of the charter of such corporation, if it be a domestic company, or, if its license to do business in this State if it be a foreign company; and the General Assembly shall provide additional and suitable penalties for the failure of any corporation to comply promptly with the requirements of this section, or of any laws passed in pursuance thereof. The commission shall compel all corporations to comply promptly with such requirements, by enforcing, in the manner hereinbefore authorized, such fines and penalties against the delinquent company as may be provided for, or authorized by, this article; but the General Assembly may relieve from the payment of the said registration fee any purely charitable institution or institutions." (Italics ours).

The terms and conditions referred to in this section of the Constitution are prescribed by sections 1104 and 1105 of the Code of Virginia and section 38-a of the Virginia Tax Bill set out in the brief of counsel for the plaintiff in error at pages 6 and 7.

Construing these sections of the Constitution and statute law of Virginia, the court of last resort of that State has held that the exercise of corporate functions such as were exercised by the plaintiff in error is forbidden to a foreign corporation which has not complied with the Constitution and the statute; that the construction work done by the plaintiff in error did constitute a doing of business in Virginia within the meaning of the Constitution and laws of that State, and this court will consider such construction binding.

New York v. *Roberts*, 171 U. S. 658, 43 L. Ed. 323 (1898).

Armour Packing Co. v. *Lacy*, 200 U. S. 226, 234; 50 L. Ed. 451, 456 (1906).

Osborne v. *Florida*, 164 U. S. 650; 41 L. Ed. 586 (1897).

In *Chattanooga National B. & L. Asso.* v. *Denson*, 189 U. S. 408, 414, 47 L. Ed. 870, 874 (1903), the Supreme Court of Alabama had construed a statute similar to the one here in question as forbidding a single act in the exercise of corporate functions by a foreign corporation which had not complied with the statute, and this court considered itself bound by the interpretation placed on the statute by the Alabama court.

So, in the case at bar, the Supreme Court of Virginia has interpreted the ~~situation and~~ statute words "doing business" to includes such exercise of corporate functions as were exercised in Virginia by the plaintiff in error and this construction of the statute is not open to review.

The first assignment of error, dealing entirely with the proper construction of the State statute will not be considered, therefore, by this court, but the only question that will be determined by this court is whether such construction is repugnant to the commerce clause of the Federal Constitution. We use the words "commerce clause" advisedly because *the assignments of error do not charge a violation of any clause of the Federal Constitution save the commerce clause.*

Counsel for plaintiff in error seems to contend that the business transacted by the plaintiff in error was an "isolated transaction" and, therefore, this court can determine whether it comes within the proper construction of the Virginia statute.

In *Chattanooga National B. & L. Asso.* v. *Denson, supra,* the Alabama court held that any one isolated act in the State by a foreign corporation was "doing business" and this court considered itself bound by that interpretation of the State statute.

Counsel for plaintiff in error, treating this subject as still an open one, presents the same argument and the same cases to this court that they did to the State court to sustain the position that the proper construction of the words "doing business" as used in section 1104 of the Code of Virginia, did not include such business as the plaintiff in error carried on in that State. But we submit that the determination of this question by the Virginia Court of Appeals is final and not subject to review.

There is not entire harmony—which would not be expected—of all State decisions in interpreting the words "doing business" as used in statutes similar to those now under review. Some States construe the words strictly and some literally. But the Virginia court—like the Alabama

court—has construed these words as used in the Virginia statute and that construction will be respected by this court.

We desire not to be understood as contending that the construction of the Virginia court cannot be reviewed to ascertain whether such construction is repugnant to the Federal Constitution. But we submit that this court will not review the construction of the Virginia statute as determined by the Virginia court, but will consider this case as if the words "doing business" used therein actually included such operations as those carried on by plaintiff in error in Virginia; and determine from such construction whether this statute under this construction, is unconstitutional, because it violates the commerce clause of the Federal Constitution; that being the only section of the Constitution claimed in the assignments of error to have been violated.

(B). Even if this Court Reviews the Construction of the Statute in Question by the State Court, it will find that Construction Correct.

In considering this question, the nature of the work done, and of the business carried on, by the plaintiff in error, must not be lost sight of. The Southern Railway Company desired the installation of certain signal systems in Virginia and negotiated with the plaintiff in error to supply the material and install the same. The Southern Railway Company was not concerned with the place from which the material came, they were solely interested in the installation of the system —furnishing the material was evidently an incident to such installation, and the clear purpose of the contract was not for the purchase of the material but the installation of a signal system along certain sections of the Southern Railway in the State of Virginia. The Southern Railway therefore entered into a contract for the construction in Virginia of such signal system on the various sections of its road. It

should be noted that each of these contracts with the Railway Company were for the construction of the system along sections of the road wholly within the State of Virginia. The work was not of an insignificant character but on a large scale, each contract taking months of continuous work on the part of the plaintiff in error in Virginia; the total work done covered one hundred and forty-seven miles at a total consideration of two hundred and fourteen thousand and forty dollars; labor was employed in Virginia; conduits and wires placed in the soil of Virginia; concrete foundations constructed in Virginia and the completed structures painted in Virginia. All the work in question from its beginning to its completion was carried on in that State. While, as we shall show hereafter, the execution of each contract was "doing business" in Virginia, yet it should be remembered that the plaintiff in error not only made and executed one contract but that he had at least under three different contracts—one in 1911, one in 1913 and one in 1914—carried on the same construction work in the State of Virginia.

Had a citizen of Virginia contracted to install such an extensive system of signals covering miles of territory and involving an outlay of thousands of dollars and the employment of a number of skilled and unskilled labor, it would hardly be contended that such contractor was not doing business in this State; moreover, because such work is done by a non-resident of the State, it would hardly be contended that he was not doing business in Virginia. The only ground, therefore, upon which the plaintiff in error must base his contention that he is not doing a local business in Virginia, is upon the ground that the material which went into the construction work carried on by him in that State was shipped from another State in response to an order previously secured. But the fact that the material used in the

construction work in question was shipped from another State in response to order previously obtained therefor, does not affect the case, but this phase of the subject will be considered at some length later herein.

Counsel for plaintiff in error, evidently realizing the force of this position, contended that the transactions of the plaintiff in error in Virginia have been isolated and sporadic; not a part of its ordinary business, and with no permanent organization here, and that, therefore, the plaintiff in error has not been doing business in Virginia.

A. The "Isolated Transaction" Rule.

This subject seems not to have engaged the attention of this court, save in two cases to which we will hereinafter refer, and it will be necessary, therefore, to ascertain the rule from the better considered opinions of the State courts of last resort.

In examining the cases on this subject, we constantly find the statement made that a single or isolated transaction does not constitute doing business within the State. This general rule, like a great many other general rules of law, is worse than useless. A single transaction may or may not constitute doing business in the State, *according to the nature of the transaction, and according to what is comprehended under the term "transaction."* If the transaction be entirely outside of the ordinary business of the corporation, if it be not within the purpose for which the corporation was formed, but only in the exercise of an incidental power, then such an isolated transaction will not constitute doing business within the State. Accordingly, it has been held that prosecuting or defending suits is not doing business within the meaning of the statute: *Free Baptists* v.

Berkley, 156 Cal. 466, 105 Pac. 411; *Bonham National Bank* v. *Grimes Pass Placer Mining Co.*, 18 Idaho 629, 111 Pac. 1078: and that filing a bill to foreclose a mortgage does not constitute doing business within the State, *Worth* v. *Knickerbocker Trust Co.* (Ala.), 55 So. 144: nor does the visit to the State by the president of a corporation, for purpose of settling a claim for damages, constitute doing business, *Hoyt* v. *Ogden Portland Cement Co.*, 185 Fed. 889: nor the making of a contract for the sale of its capital stock, for this is not the business for which the corporation was formed, nor which it was expected to be carried on or conducted, *Southworth* v. *Morgan*, 143 App. Div. 648.

On the other hand, it is constantly held (even by the same courts that sometimes lay down the general rule that an isolated transaction does not constitute doing business) that a single transaction is prohibited under the statutes (a) if it be in the exercise of its ordinary or usual corporate functions, (b) where such transaction indicates a purpose to carry on a substantial part of its dealings within the State, and (c) involves constantly new relations. This rule was laid down in the case of *Alabama Western R. R. Co.* v. *Talley-Bates Construction Co.*, 162 Ala. 396, 50 So. 341, where the contract was to build a railroad in the State of Alabama. In *Thompson* v. *Iowa State Traveling Men's Association*, 88 Neb. 399, 129 N. W. 529, the rule is laid down that a single transaction by a foreign corporation may constitute a doing of business when such transaction is a part of its ordinary business and indicates a purpose to carry on a substantial part of its dealings in the State.

But this single transaction must be such as pertains to the ordinary business and purposes of the corporation as distinguished from an act within its powers and must involve a continuous series of acts and constantly new relations. *Free Baptists* v. *Berkley*, 156 Cal. 466, 105 Pac. 411.

Thus, it has been held in Pennsylvania that the *construction of a railway* in that State by a foreign corporation constitutes doing business in the State. *Delaware River Quarry Co.* v. *Nazareth Passenger Company*, 204 Pa. St. 22, where the Supreme Court of Pennsylvania held (syllabus):

> "Where a foreign corporation comes into the State and engages in the business of constructing an electric railway during a period of six months, and in this business employs large numbers of men and nearly all of its capital, and does not file a statement in the office of the Secretary of the Commonwealth, (as is required by law), until two months after the work was completed, it cannot maintain an action for labor and materials furnished by it during the progress of the work."

In the course of its opinion the court, speaking through Mr. Justice Fell, said (p. 24):

> "This act has been liberally construed and *isolated transactions between a foreign corporation and citizens of this State have been held not to come within its prohibition*, and only such corporations as have entered this State by their agents and prosecuted their *ordinary business* here have been considered as doing business in violation of the act. That the plaintiff is within the prohibition there is little room for doubt. It came into the State with its agents and workmen and for the period of six months was engaged in the *continuous prosecution of its ordinary business*, employing a large amount, if not all, of its capital and *creating new obligations day by day*." (Italics ours).

Save in so far as this case involved the employment of nearly all the capital of the corporation, the facts are identical with those in the case at bar.

It may be remarked in passing that the Pennsylvania case relied on in the brief for the appellant, *Williams, Inc.*, v. *Golder & Crick*, 247 Pa. 397, in no way throws any doubt upon the case last cited and may be differentiated from the case last cited and from the case at bar in that the work done on the material sold was held not to be a part of its *ordinary business*, whereas, *in the case at bar*, as well as in the case of *Delaware River Quarry Co.* v. *Nazareth Passenger Co.*, the *work done was a continuous transaction in furtherance of its ordinary business.*

As shown by the evidence, succinctly summed up in the opinion of the Supreme Court of Appeals of Virginia (R. p. 47), the plaintiff in error is engaged in the business of *manufacturing, selling and installing railroad signals*, and *it was engaged in that business in Virginia* at the time these proceedings were brought, and had engaged in such business at various times since 1911. Furthermore, this is the only business it ever carried on in Virginia.

B. The "Isolated Transaction" Rule does not Apply to Construction Contracts.

The "isolated transaction" rule has never been held to apply to construction contracts, such as those involved in the case at bar, where the work of construction involved immense outlays of money, material and labor and where it extended over a long period of time, creating, as it did in the case of *Delaware River Quarry Co. v. Nazareth Passenger Company*, 204 Pa. St. 22, *supra*, constantly new obliga-

tions. In addition to the cases just examined, we desire to call to the attention of the court others which establish this proposition.

A case very similar to the case at bar, is the case of *American Amusement Co.* v. *East Lake Chutes Co.*, 56 So. (Ala.) 961 (1911), in which it was held that a foreign corporation which executes a contract for the sale of machinery located in another State for its transportation to Alabama, and for the furnishing of labor and machinery to assemble or construct it in Alabama, was doing business in Alabama and must comply with the conditions imposed by the statutes of that State before carrying on such business. The facts in that case are so nearly like those in the case at bar that it would appear to be decisive of the issue before this court, especially as this construction of the Alabama statute *was recognized by this court in Chattanooga National B. & L. Asso.* v. *Denson*, 189 U. S. 408.

In the Alabama case, the court, in passing on the question whether the plaintiff was doing business in the State of Alabama, said (p. 962):

> "* * * It is evident that, had the transaction in question involved no more than the sale and delivery of the machinery by the plaintiff to the defendant in Alabama, it would have been an act of interstate commerce, to which the laws of Alabama are not and could not be applicable. But the contract was not for the sale of machinery. It was an entire contract for transporting and assembling (that is, building into a structure) certain materials on the defendant's premises. This includes, as set forth in the complaint and replication, both labor and materials; and the fruition of the contract was not the delivery of an article of commerce to the defendant, but the

erection of an improvement on its premises for a gross consideration. *Beard's Case*, 71 Ala. 60.

In doing this, there can be no doubt but that the plaintiff was doing business in Alabama, became subject to its laws with respect thereto, and was not within the protection of the principles that render interstate commerce immune against local regulation. Certainly labor is not an article of commerce, nor is the agreement to supply it, nor the execution of the agreement an act of commerce. * * *."

Mutatis-mutandis, this language applies with equal force to the case at bar.

In *St. Louis Expanded Metal Fireproofing Co.* v. *Beilharz*, 88 S. W. (Tex.) 512, it was held that a foreign corporation which made a contract in the State to furnish labor and material for construction work and, in pursuance thereof, sent laborers and employees, together with a superintendent, into the State to perform the contract, engaged in business within the State within the meaning of the statute requiring foreign corporations to file their articles with and receive from the Secretary of State a permit to transact business in the State. In the course of its opinion, the court said (p. 513):

"Upon the question whether the transaction out of which the appellant's original cause of action arose came within the terms of Article 745 of our statute, or constituted interstate commerce, the evidence shows that the appellant entered into a contract with appellee, Theo. Beilharz, in January, 1898, by which it undertook to furnish the material and labor and construct portions of a large building

> in the city of Dallas, known as the 'Linz Building, in conformity with the contract then existing by the said Beilharz, as contractor, and Joseph Linz and Simon Linz, as owners; that in accordance with its contract with Beilharz appellant sent a large quantity of material to Dallas to be wrought into said building, and also sent a number of laborers and employees to do the work it had engaged to do, together with one Quigley to superintend the same; that it required, approximately, twelve months to complete said work during the greater portion of which time the said Quigley resided in the city of Dallas, and together with appellant's laborers was engaged in said work as appellant's agent; that during the progress of said work the said Quigley, as the representative of appellant, employed labor and made various purchases of material from parties in Dallas, Texas, to enable him to carry on said work. The foregoing facts were established by the undisputed evidence."

After examining the question of some disputed facts, the court then goes on to say:

> "We think the undisputed facts show that the transaction in question was not of a character of interstate commerce and that appellant's right to maintain this suit depends upon a compliance with the provisions of said Article 745 * * *. The case is clearly distinguishable on the facts from *Aller* v. *Tyson Jones Buggy Co.* and *Miller & Co.* v. *Goodman*, reported in 91 Texas, pp. 22 and 42, respectively, and other cases in which it has been held that the transactions involved belonged to interstate com-

merce. Here it is not simply a case of the sale by a corporation created by another State of goods and shipped into the State of Texas to the purchaser, *but the prosecution by such a corporation in the State of its business as though it was operating in the State of its creation.* The transaction *involved the performance in the State of Texas by appellant, in its corporate capacity, of a contract for the construction of material portions of a building being erected in this State.* By the terms of this contract, as we understand it, appellant did not sell to Beilharz directly the material shipped from St. Louis, Mo., and used in the construction of said building, but by the stipulations of said contract it obligated itself to furnish such material, together with the labor necessary for the completion of such portion of said building as it had engaged to construct in conformity with the contract Beilharz had with the owners of said building, for which it was to receive a lump sum, not as pay for the material shipped from another State alone, but for the labor performed and material purchased in this State as well. *Nor is it a case in which a single corporate act is performed by a corporation in a State other than that of its creation.*" (Italics ours).

We have thus cited fully from this case because the contract in the case at bar is almost identical in terms with the contract construed in his case, and it is to be observed that the court expressly holds that in performing such a construction contract, a foreign corporation is not engaged in an isolated transaction, but that the performance of the contract involves the carrying on, in its corporate capacity,

of various transactions which are necessary for the completion of such a contract.

Counsel for plaintiff in error appear to base their contention that the extensive operations of the plaintiff in error in Virginia is not "doing business" in that State, and cites *Cooper Manufacturing Co.* v. *Ferguson*, 113 U. S. 727, 28 L. Ed. 1137 (1885) to sustain its position. But there are two manifest reasons why that case is no authority for the contention of plaintiff in error in the case at bar.

In the first place, the facts in that case were entirely different from those here in issue. In that case, an Ohio corporation made a contract in Colorado to manufacture in Ohio certain machinery to be delivered in Ohio for transportation to the purchasers in Colorado. This court held that the mere making of the contract in Colorado in consequence of which an interstate movement took place, did not constitute doing business in Colorado, which was entirely in keeping with the spirit of that long line of cases to which we will have occasion to refer later, that the taking of orders or executing of contracts in one State for goods to be shipped into that State from some other State, is not doing business within the first State, but is interstate commerce. This court, in that case, held that "the making in Colorado of the one contract sued on in this case, by which one party agreed to *build* and *deliver* in Ohio certain machinery and the other party to pay for it, did not constitute a carrying on of the business in Colorado." In a concurring opinion, Mr. Justice Matthews and Mr. Justice Blatchford held that the contract in question was interstate commerce. In discussing this point, the opinion goes on to say (p. 737):

> "The transaction in question was clearly of that character. It was the making of a contract in Colorado to manufacture certain machinery in Ohio, to be there delivered for transportation to the purchasers in Colorado. That was commerce and to prohibit it, except upon conditions, is to regulate commerce between Colorado and Ohio, which is within the exclusive province of Congress."

That case is readily distinguished from the case at bar. In that case the contract obligated the corporation to build and deliver *entirely* completed machinery to a concern in a foreign State. So far as the State of Colorado was concerned, the case was no different from the ordinary case of goods shipped to one State from another in consequence of an order previously given. In the case at bar, the work of construction, *which was the real purpose of the contract, was that which caused the outlay of time and money in Virginia, was done on materials after they had come to rest in this State as a part of the mass of property in the State.*

In the second place, the decision of this court on the question as to whether the act complained of was "doing business" in Colorado, was based on the interpretation of the Colorado statute by the Supreme Court of Colorado. In other words, this court did not undertake to pass on the question but called especial attention to the fact that the State court had construed the stature as not to apply to a single exercise of corporate function in the State. This court, at the very inception of the consideration of the question, said (pp. 733-4 of U. S. Rep.):

> "The question, therefore, is whether, upon a true construction of the Constitution and statute, the

making of the contract which the plaintiff seeks to enforce was, under the cicumstances stated, forbidden.

"The contention of the defendants in error is that the prohibition against the doing of any business in the State by a foreign corporation, except upon the prescribed condition, includes the doing of any single and isolated act of business whatever. Thus broadly stated, it is clear that the interpretation of the defendants cannot be sustained. In a case involving the construction of the statute, the Supreme Court of Colorado held that a foreign corporation might, without complying with the provisions of the statute, maintain an action in the courts of the State to recover damages for trespass to its real estate. The court said: 'The prohibition extends to doing business before the compliance with the terms of the statute. We do not think this an abridgement of the right of a foreign corporation to sue. It extends only to the exercise of the powes by which it may be said to ordinarily transact or carry on its business. To what *extent* the exercise of these powers is affected we do not decide.' *Utley* v. *The Clark-Gardner Mining Co.*, 4 Colorado 369. So it is clear the statute cannot be construed to impose upon a foreign corpoation limitations of its right to make contracts in the State for carrying on commerce between the States, for that would make the act an invasion of the exclusive right of Congress to regulate commerce among the several States. *Paul* v. *Virginia*, 8 Wall. 168. The prohibition against doing any business cannot, therefore, be literally interpreted."

In that case, this court evidently recognized the fact that the different State courts of last resort had variously construed the words "doing business' as contained in the statutes of the respective States, and it was only interested in the effect of the construction placed on the particular statute by the Colorado court. In the Alabama case, this court looked to the construction placed on the statute by the Alabama court and considered itself bound thereby, though the Alabama court and the Colorado court do not take entirely the same view of the matter.

This case further sustains our position above, namely: that this court will respect the decision of the Supreme Court of Appeals of Virginia as to the construction of the statute and will only determine whether such in any way is repugnant to the commerce clause of the Federal Constitution.

This case of *Cooper Manufacturing Co.* v. *Ferguson, supra,* is the parent case to a great many other cases of like nature, decided by the various State courts, which hold that so far as the cases involved work to be done upon goods sold and shipped in interstate commerce, the work to be done was incidental to the contract of sale and did not take the case out of the protection of the commerce clause of the Federal Constitution. Most of these cases have been collected and cited in the brief for the plaintiff in error. We have purposely refrained from discussion of the incidental connection with interstate commerce because that phase of the subject will be considered in treating the second assignment of error. Suffice it to say here that, while, as we have heretofore said, the various State courts have differed in the extent to which they would go in disclosing certain acts of foreign corporations "doing business" within the meaning of the respective State statutes, none of them have gone so far as to hold that a foreign cor-

poration is not "doing business" within the State when it conducts an enterprise therein as extensive as, or the nature of, the enterprise conducted by the plaintiff in error in Virginia.

Many of the cases cited in the brief for plaintiff in error were cases which arose under circumstances where suits were brought by a foreign corporation to procure the payment of the purchase price of goods sold and the defendants pleaded that the contracts were invalid because the corporations had not complied with the law requiring foreign corporations to fulfil certain conditions before doing business in the State. The cases held that the business complained of was not local, but interstate commerce, and are easily distinguishable from the case at bar, for in none of them were repeated and extensive operations carried on within the State as in the case at bar.

Counsel for plaintiff lays great stress on the case of *Williams, Inc.* v. *Goldin, etc.*, 247 Pa. St. 397 (1914) as controlling here, but we have already differentiated this case from the case at bar.

Counsel for plaintiff in error, realizing that, if their contention as to the pertinency of this case to the case at bar is correct, then it conflicts with that other well considered Pennsylvania case of *Delaware River, etc. Co.* v. *Bethlehem, etc., Ry. Co.*, 204 Pa. St. 22 (1902). They attempt to meet the apparent inconsistency by stating the test to be whether the corporation is in the State temporarily or permanently and what is the business of the corporation. Applying without admitting this to be the test, the plaintiff in error was manifestly doing business in Virginia.

In the case of *Delaware River, etc.*, v. *Bethlehem Ry. Co., supra*, the stay in the State was only six months, the same time the plaintiff in error took to complete its contract in the case at bar. In that case, the contract was to construct

a railroad, and, in the case at bar, the contract was to construct a signal system. Counsel for plaintiff in error contend that, by the test which they lay down, the case of *Delaware River, etc., Co.* v. *Bethlehem, etc., Ry. Co., supra*, was clearly a case of doing business in the State of Pennsylvania, and by the same test the case at bar is clearly a case of doing business in the State of Virginia.

Finally, the recent decision of this court in the case of *Browning* v. *Waycross*, 233 U. S. 16, 58 L. Ed. 828 (1914) sustains the position of the Virginia Supreme Court of Appeals in holding that the plaintiff in error was "doing business" in Virginia. In fact, that case is decisive of practically every position taken by plaintiff in error in the case at bar. In that case, this court sustained the Court of Appeals of Georgia in holding that the foreign corporation, through its agent, Browning, was "doing business" within the meaning of the Georgia statutes, when he carried on in that State operations in every respect similar to those carried on in the case at bar. As we shall review this case at some length later herein, it is only necessary here to note the marked similarity of the facts and contentions of the plaintiff in error in the two cases.

As said by the distinguished chairman of the State Corporation Commission in delivering his opinion in this case, which was adopted by the Supreme Court of Appeals (R. p. 43):

> "If the erection of such structures is construed to be engaging in interstate commerce and not doing business within the State in which they are erected then it follows that none of the great railway supply companies, nor those persons and corporations engaged in the construction of locomotives, engines, cars, the cuttings of ties, the building of station

houses, the construction of office buildings, and producing many other things ultimately intended to be instrumentalities of commerce, are doing business within the States in which such occupations are carried on. If such a doctrine be established then the defendant company is not doing intrastate business in the State of New York because it is engaged in the construction of instrumentalities intended to be used in interstate commerce. We believe the true doctrine to be that those engaged in manufacturing or producing instrumentalities of commerce are engaged in intrastate business in the State in which the work is done and subject to all the laws of the State governing local business transactions. After such instrumentalities have become instrumentalities of interstate commerce then different questions, not pertinent here, may arise."

II.

THE PLAINTIFF IN ERROR IN CONSTRUCTING RAILROAD SIGNALS WAS NOT ENGAGED IN INTERSTATE COMMERCE BUT IN A PURELY LOCAL BUSINESS.

The second assignment of error is based on the contention that the plaintiff in error was engaged in interstate commerce and, therefore, it could not be compelled to comply with the statutes in question.

We recognize the principle laid down by this court in a long line of cases in which it has been uniformly held that where goods are shipped from one State to another in con-

sequence of a previous order, such transaction is interstate commerce and cannot be burdened by local authorities. But these cases have no application to the case at bar. Undoubtedly, the plaintiff in error had the right to take orders in Virginia for signals and ship them to the purchaser in that State in consequence thereto without being subject to State regulations.

The case of *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, 30 L. Ed. 694 (1887), laid down this principle and it has been followed in a long line of cases decided by this court. The Supreme Court of Appeals of Virginia has recently recognized this principle in the case of *Dalton Adding Machine Co.* v. *Commonwealth*, now pendin before this court. But this was not done in the case at bar. This was not a delivery of goods in Virginia in response to an order previously obtained, and in insisting that the Virginia decision in the case at bar was correct, we have no desire to question the authority of the case of *Robbins* v. *Shelby County Taxing District, supra*, which is quoted from at such length in the brief for the plaintiff in error.

But it is just as well established that if the goods have been brought to Virginia from another State and have come to rest in Virginia and are mingled with the mass of property of that State, they lose at once their interstate character so far as they are protected by the commerce clause of the Federal Constitution, and they become liable to State taxation.

Brown v. *Houston*, 114 U. S. 622, 29 L. Ed. 257 (1885).

American Steel, etc., Co. v. *Speed*, 192 U. S. 500, 48 L. Ed. 538 (1904).

Armour Packing Co. v. *Lacy*, 200 U. S. 226, 50 L. Ed. 451 (1905).

A fortiori, if, after the transportation, after they have come to rest in Virginia, the owner changes their form from personal property to real estate by building them into permanent structures, such a dealing with such property is not interstate commerce.

But, counsel for plaintiff in error, evidently realizing the rule laid down in the cases last above cited in determining whether or not its acts were interstate commerce, claims that its acts in the State of Virginia were incidental to the sale and delivery of its signals, and therefore not within the rule laid down in these cases. They contend that the main object of the contract was the sale of its manufactured products and that the construction work done in Virginia was merely incidental to the delivery of its products to the purchaser in Virginia.

The very letters and contracts introduced in evidence in this case by the plaintiff in error deny this contention, for they clearly show, as said by the Supreme Court of Appeals of Virginia (R., p. 48), "that the main object as expressed in the contracts was to erect and install and complete the signal system in Virginia, and that the furnishing of the material was the necessary and preliminay incident of the contract."

To sustain their position counsel for plaintiff in error relies on the rule as to acts incidental to interstate shipments of goods after the shipment has reached its destination, laid down in *Cardwell* v. *North Carolina*, 187 U. S. 622; *Rearick* v. *Pa.*, 203 U. S. 507; *Davis* v. *Virginia*, 236 U. S. 697; *Dozier* v. *Alabama*, 218 U. S. 124, 54 L. Ed. 595, and other cases of that nature.

This line of decisions has recently been distinguished by the court from cases similar to the case at bar in *Browning* v *Waycross*, 233 U. S. 16, 58 L. Ed. 828 (1914).

As this case is decisive of nearly all points raised in brief for plaintiff in error, both under this head and prior and subsequent heads, it is necessary to scrutinize the same carefully. Browning was charged with violating a municipal ordinance, imposing an annual occupation tax upon lightning rod agents or dealers engaged in putting up or erecting lightning rods within the city of Waycross. He defended on the ground that he had carried on the businses as an agent of a St. Louis corporation on whose behalf he had solicited orders for the sale of the lightning rods; that he had received the rods when shipped on such orders from St. Louis and had erected them for the corporation, the price paid for the rods to the corporation including the duty to erect them without further charge; and it was claimed that this method of doing business constituted carrying on of interstate commerce, which the city could not tax.

It was claimed that the installation of the lightning rods was merely *incidental* to the sale and a part of the interstate transaction, protected from State or municipal taxation by the commerce clause of the Constitution; but this court held that the business of affixing lightning rods to a house was strictly local in its character, peculiarly within the exclusive control of the State authorities, and that said business was wholly separate from interstate commerce, involving no question of delivery of property shipped in interstate commerce or the right to complete an interstate commerce transaction.

Mr. Chief Justice White, who delivered the ,opinion, states the question involved as follows (p. 20):

> "The sole question, therefore, here is whether carrying on the business of erecting lightning rods in the State, under the conditions established, was

interstate commerce, beyond the power of the State to regulate or directly burden."

After reviewing some of the cases relied on in the case at bar, the court continues (p. 21 U. S. Rep.).

"It is evident that these cases when rightly considered, instead of sustaining, serve to refute, the claim of protection under the interstate commerce clause which is here relied upon since the cases were concerned only with merchandise which had moved in interstate commerce and where the transactions which it was asserted amounted to the doing of local business consisted only of acts concerning interstate commerce goods, dissociated from any attempt to connect them with or make them a part in the State of property which had not and could not have been the subject of interstate commerce. Thus, in *Caldwell* v. *North Carolina*, the court laid emphasis upon the fact that the shipment of the pictures in interstate commerce in one package and the frames in another was not essential but accidental for the two could have been united at the point of shipment before interstate commerce began as well as be brought together after delivery at the point of destination. And this was also the condition in the *Rearick Case*. Indeed, it is apparent in all three cases that there was not the slightest purpose to enlarge the scope of interstate commerce so as to cause it to embrace acts and transactions theretofore confessedly local, * * *."

The court then sums up the case in the following language (p. 22 U. S. Rep.):

> "We are of opinion that the court below was right in holding that the business of erecting lightning rods, under the circumstances disclosed, was within the regulating power of the State and not the subject of interstate commerce, for the following reasons: (a) because the affixing of lightning rods to houses was the carrying on of a business of a strictly local character, peculiarly within the exclusive control of the State authority; (b) because besides, such business was wholly separate from interstate commerce, involved no question of the delivery of property shipped in interstate commerce or the right to complete an interstate transaction, but concerned merely the doing of a local act after interstate commerce had completely terminated. It is true that it was shown that the contract under which the rods were shipped bound the seller, at his own expense, to attach the rods to the houses of the persons who ordered rods, but it was not within the power of parties by the form of their contract to convert what was exclusively a local business, subject to State control, into an interstate commerce business protected by the commerce clause."

There are two principles applicable to the case at bar to be deducted from *Browning* v. *Waycross, supra.*

In the first place, a construction contract, involving work to be done on materials which have been brought into the State in interstate commerce after the interstate commerce has been concluded is subject to State regulations.

Applying, therefore, the rule of *Browning* v. *Waycross* to the case at bar, the following propositions are clearly established:

(1) The several transactions of the plaintiff in error in the State of Virginia, in fulfilling its construction contracts with the Southern Railway, involved, first, the bringing of material to the State of Virginia in interstate commerce; and, second, after the interstate commerce had completely terminated, the work of construction was entirely within the power of the State of Virginia to regulate.

(2) These several contracts were not isolated transactions, but their execution in the State of Virginia, through its agents and workmen for a long period of time, involving the expenditure of large amounts of money, material and labor, was in the exercise of the ordinary and usual corporate functions of this corporation, and was the carrying on in this State of a substantial part of the corporation's business and involved constantly new obligations on the part of the corporation.

(3) The work done by the corporation in the execution of said contracts was precisely the same kind of work as was done by the corporation in the State of its creation, and was precisely the same kind of work as was contemplated to be done when it was created.

(4) The work done upon the materials in this State was not incidental to the contract of sale.

In the second place, if, in *Browning* v. *Waycross, supra,* the business of affixing lightning rods to a house was the carrying on of a business of a strictly local character, peculiarly within the exclusive control of the State, surely the business of erecting poles, digging ditches, putting down conduits, running wires, erecting motors and transformers, is a business of a strictly local character, pecu-

liarly within the exclusive control of the State authorities. And if the affixing of lightning rods to a house is a business wholly separate from interstate commerce, involving no question of the delivery of property shipped in interstate commerce, or the right to complete an interstate commerce transaction, but concerns merely the doing of a local act after interstate commerce has completely terminated, surely the work done by the plaintiff in error on the materials which had already been brought into the State or purchased here was entirely separate from interstate commerce, involving no question of the delivery of propety which had been shipped in interstate commerce, and involving no question of the right to complete an interstate commerce transaction, but such work concerned merely the doing of a local act after the interstate commerce had completely terminated.

By any other construction, this court will so extend the protecting arm of the commerce clause of the Federal Constitution as to allow a corporation to engage in construction business in Virginia, because the materials used by such corporation in such construction work were shipped from another State in response to an order for the same.

Counsel for plaintiff in error attempts to secure a distinction between the case at bar and *Browning* v. *Waycross*, *supra*, by calling attention to the closing words of the opinion reading as follows (p. 23 U. S. Rep.):

> "Of course, we are not called upon here to consider how far interstate commerce might be held to continue to apply to an article shipped from one State to another, after delivery and up to and including the time when the article was put together or made operative in the place of destination in a

> case where, because of some intrinsic and peculiar quality or inherent complexity of the article, the making of such agreement was essential to the accomplishment of the interstate transaction. In saying this, we are not unmindful of the fact that some suggestion is here made that the putting up of the lightning rods, after delivery by the agent of the seller, was so vital and so essential as to render it impossible to contract without an agreement to that effect,—a suggestion, however, which we deem it unnecessary to do more than mention in order to refute it." (233 U. S., p. 23).

After quoting this excerpt in their brief (p. 53), counsel for plaintiff in error says that "the outstanding feature of the case, so far as concerns our situation, is the significant language of the last paragraph of the opinion, quoted above. Justice White might have had in mind the present facts, so appropriate are his words." Whether Mr. Chief Justice White had in mind such a case as this, we will endeavor presently to determine; but it may not be out of place to remark that witnesses of plaintiff in error in the case now before the court evidently had the learned Chief Justice's language in mind, and that the case was presented for the purpose of testing whether the facts thereof brought it under this expression of Mr. Chief Justice White.

If we examine the opinion of the court below (the Supreme Court of Georgia), 74 S. E. 564, some light may be thrown upon this question. This opinion Mr. Chief Justice White approved in the following language (p. 19):

> "On error to the Court of Appeals, the judgment (of the court below) was affirmed, the court stating its reasons for doing so in a careful and discriminat-

ing opinion reviewing and adversely passing upon the defence under the Constitution of the United States. (11 Ga. App. 46)."

Says the Georgia court in discussing the case (74 S. E. 566):

> "A case might be conceived of where on account of the peculiar nature of the article, or the secrecy of the process, only the seller or manufacturer could put it in condition to be used, and where the article would be worthless unless delivered in complete state ready for use. In such a case, to take away the right to put it in condition for use would practically destroy the sale; and hence, where the article was the subject of an interstate sale, to tax the right to install it would be an unlawful interference with interstate commerce. For example, if a portable house should be the subject of an interstate sale, and it could only be put together by a process known to the manufacturer, he would be protected from interference both in making the sale and in erecting the house."

No such case as is here conceived of by the Georgia court is presented by the facts in the case at bar. As we have already seen, it is clearly established that while the appellant had contracts for construction and installation with the Southern Railway, it sold to other railroads in Virginia the material and those roads made their own construction (record, p. 10); and it was also shown in the evidence that the last order taken by this company was from the Interborough Rapid Transit Co., of New York City, for the subways known as Chatham Squa[illegible]nd that that work was

installed not by the signal company but by the railway company. See printed record, p. 8, where other cases are mentioned where the installation took place not by the signal company but by the railway company. Thus, it appears that however complicated the act of construction may have been, other railroads in Virginia were accustomed to do this work, as well as railroads outside of Virginia.

It is submitted that the true test is not whether the *purchaser* can do the work of construction; for owners of houses are rarely such experienced mechanics as to be able to construct and install lightning rods; but the test is whether the process of construction is such a peculiarly secret one, or one of such inherent complexity, that only the seller is able to do the work. Since, as we have seen, railroads in Virginia and elsewhere are accustomed to construct and install railway signal systems, it is perfectly clear that this case does not come under the circumstances conceived of by the Georgia court and of which we find an echo in the closing words of Mr. Chief Justice White in *Browning* v. *Waycross*.

The plaintiff in error in its brief admits that the seller does not always have to do the work. We find on page 54 thereof the following language:

> "The defendant is admittedly a manufacturing corporation making interstate sales of its products. They have by their nature to be put together in place after arrival at their destination, and by reason of their complexity the manufacturer *often* must do it."

While the manufacturer *often* must do the work, because it contracts to do so, the manufacturer *often* does not do the work, because it simply sells its materials to the purchaser who, with its own force, proceeds to install and con-

struct the signals. As is admitted on p. 3 of plaintiff's in error brief, "some railroads have signal corps which are competent to put together and install modern railway signals."

This being so the case does not come within the condition referred to in *Browning* v. *Waycross*—the plaintiff in error, according to the evidence, was accustomed to sell its material to the railroad companies who would install it with their own force or the plaintiff in error would enter into a contract for the sale and construction and installation of the signals. The construction was not incident to the sale but the sale was incident to the construction.

It is to be noted, also, that in the case at bar, as in *Browning* v. *Waycross, supra* the materials were brought into this State or bought here, and the construction and installation, lasting a long period of time and involving many and varied transactions and constantly new obligations, took place *here*, while in the cases relied on by the plaintiff in error involving the delivery of machinery, the work on the materials took place *outside of the State* and the work of setting up or installing the machinery was only *incidental* to the sale and was necessary to complete the interstate contract.

Other cases sustaining these principles are:

Imperial Curtain Co. v. *Jacob*, 127 N. W. (Mich.) 772.

Haughton Elevator Co. v. *Detroit Canday Co.*, 150 Mich. 25, 120 N. W. 18.

York Man. Co. v. *Colley*, 172 S. W. (Tex.) 206.

Oakland Sugar Mills Co. v. *F. W. Wolf Co.*, 55 C. C. A. 93, 118 Fed. 239.

(Opinion delivered by Lurton, circuit judge).

The case of *York Man. Co.* v. *Colley, supra,* is interesting because it considers the case of *Browning* v. *Waycross, supra,* and it is also instructive and absolutely in point.

In that case, the appellant sued the appellee upon a written contract and to foreclose a lien upon a certain ice manufacturing plant, which appellant had constructed for appellee. The defence was that the appellant was a foreign corporation and was doing business in the State of Texas without having obtained the permit required by law, and, therefore, was not authorized to maintain its suit on the contract. By the terms of the contract, the York Manufacturing Co. agreed to construct and deliver to the appellees on the railroad depot at Stockdale, Texas, with freight allowed, the machinery, apparatus and plant for the construction of an ice plant in the Town of Stockdale for the defendant; and the York Manufacturing Co. further agreed to furnish one erecting engineer to superintend the erection of machinery, apparatus or plant furnished by it, the purchaser to furnish one engineer to assist in erecting the same, and the York Manufacturing Co. was to have entire charge of the plant during the erection of the same and when ready for operating it was to be operated in accordance with the directions given by the representatives of the York Manufacturing Co. It was contended by the appellant that it did not agree to install the plant, but that it merely furnished an engineer to superintend the installation of the machinery by the appellees, and that its work in that regard was incidental to the sale of the machinery and protected by the commerce clause. On this point the court said (p. 208):

> "Appellant contends that it did not agree to install and did not, in fact, install the machinery, but merely furnished an engineer to superintend the in-

> stallation by appellees of the machinery. But we think it is evident, from a reading of the contract, that appellant retains the possession of the property until it shall have been installed and virtually bound itself to deliver a finished plant, with the exception that appellee should furnish the labor necessary to carry out the engineer's instructions. * * * There are a number of cases in which it has been held that contracts for the sale of machinery in one State, to be installed by the seller in another, are protected by the commerce clause of the Federal Constitution. See *Flint and Walling Manufacturing Co.* v. *McDonald*, 21 S. D. 526, 114 N. W. 684, 14 L. R .A. (N. S.) 673; *Milan Mill* v. *Gorten*, 93 Tenn. 590, 27 S. W. 971, 26 L. R. A. 135; *Gates Iron Works* v. *Cohen*, 7 Col. App. 341, 43 Pac. 667."

The court then goes on to examine some of its former opinions in the light of the case of *Browning* v. *Waycross*, 233 U. S. 16, 58 L. Ed. 828. After an examination of these opinions, the Texas court then goes on to say (p. 209):

> "This case being the latest expression of the Supreme Court of the United States which has come to our notice, we shall attempt to apply the rules therein enunciated to the facts of this case. Such facts we think show clearly that appellant contracted to engage in, and did engage in the strictly local business of installing an ice manufacturing plant; but were it conceded that it merely contracted to engage in and did engage in the business of supervising and superintending the erection of an ice plant, such business was a strictly local business. In either event, the contract calls for the transaction of

> business in this State without having obtained a permit. Appellant bound itself to connect, or superintend the connection of the machinery with property in this State which had not been the subject of interstate commerce."

These cases, we submit fully sustain the holding of the Supreme Court of Appeals of Virginia that the plaintiff in error, during the many months it was constructing a signal system in Virginia, was doing business in that State, not protected by the commerce clause of the Federal Constitution.

III.

THE LICENSE FEE REQUIRED OF THIS FOREIGN CORPORATION BY THE STATE OF VIRGINIA IS NOT A BURDEN UPON ITS INTERSTATE COMMERCE.

The third contention of the plaintiff in error is that the imposition of the tax under section 38a of the Virginia Tax Bill, as amended by Acts of 1910, ch. 53, p. 77, as a condition of its doing an intrastate business, is a burden upon the interstate commerce done by the said corporation, and, therefore, invalid under the Federal Constitution.

Section 38a of the Virginia Tax Bill, as amended, so far as applicable to this question, provides as follows:

> "Every foreign corporation when it obtains from the State Corporation Commission a certificate of authority to do business in this State shall pay an entrance fee into the treasury of Virginia, to be ascertained and fixed as follows: for a company whose

maximum capital stock is fifty thousand dollars or less, thirty dollars; for a company whose capital stock is over fifty thousand dollars and not to exceed one million dollars, sixty cents for each one thousand dollars or fraction thereof; over one million dollars and not to exceed ten million dollars, one thousand dollars; * * *."

The company's capital being five million dollars, the entrance fee required of it would be one thousand dollars.

To sustain the contention plaintiff in error cites a long list of authorities, beginning with *Leloup* v. *Port of Mobile*, 127 U. S. 640, 32 L. Ed. 311, and including *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1, 54 L. Ed. 355, and *Pullman Co.* v. *Kansas*, 216 U. S. 56, 54 L. Ed. 378, and *St. Louis S. W. R. Co.* v. *Arkansas*, 235 U. S. 350, all of which are cases involving the right of the State to impose a license tax upon public service corporations engaged in both interstate and intrastate commerce within the State. These cases establish the well known doctrine that the State has no right to lay a tax upon interstate commerce in any form, or to exclude a corporation or person from engaging in interstate commerce within the State; and while they recognize the doctrine established in *Osborne* v. *Florida*, 164 U. S. 650, 41 L. Ed. 586, that the State has the right to charge such companies a license or occupation tax for doing a purely intrastate business, so long as it leaves the company the right to engage in interstate business without molestation or burden, yet the State cannot, under the guise of a tax upon the intrastate business, lay a tax, based upon the total capital of the company engaged in both interstate and intrastate business, which will be a burden upon its interstate business.

In other words, as said by Mr. Justice Harlan in delivering his opinion in the *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, 33, 54 L. Ed. 355, 369 (1910) the general rule is laid down that a State may, if it chooses to do so, exclude foreign corporations from its limits or impose such terms and conditions on their doing business in the State as in its judgment may be consistent with the interests of the people, but the case of *Western Union Telegraph Co.* v. *Kansas, supra,* and the companion case of *Pullman Co.* v. *Kansas*, 216 U. S. 56, 54 L. Ed. 378 (1910) called attention to the fact that this broad statement of the law was misleading. In the Western Union case, Mr. Justice Harlan distinguishes the case laying down this general rule from the case he was then considering on the ground that these were cases in which the particular foreign corporations before the court was engaged in ordinary business not directly or regularly in interstate or foreign commerce. Mr. Justice Harlan (p. 41 U. S. Rep.) distinguished between a case where it is necessary to carry on a local business in connection with the interstate commerce and the case where a local business can be renounced without affecting interstate commerce.

Mr. Justice White, in delivering a concurring opinion in the companion case of *Pullman Co.* v. *Kansas, supra,* recognized the general rule above laid down and demonstrates that this only applied, when the right of exclusion is absolute and not relative as it was in the case then under consideration.

The same question soon came up again in this court in the matter of the *Southern Rwy. Co.* v. *Greene,* 116 U. S. 400, 54 L. Ed. 536, in which it was held that a foreign railway corporation which had come into the State in compliance with its laws and had acquired property of a fixed and permanent nature and had paid the tax levied by the

State was protected against the imposition of an additional franchise tax under the circumstances of the case. In discussing the Western Union Company and the Pullman Company cases the court said (p. 413 U. S. Rep.):

> "It is sufficient for the present purpose to say that we are not dealing with a corporation seeking admission to the State of Alabama, nor with one which has a limited license, which it seeks to renew, to do business in that State; nor with one which has come into the State upon conditions which it has since violated. In the case at bar we have a corporation which has come into and is doing business within the State of Alabama, with the permission of the State, and under the sanction of its laws, and has established therein a business of a permanent character, requiring for its prosecution a large amount of fixed and permanent property, which the foreign corporation has acquired under the permission and sanction of the laws of the State."

This line of cases do not in any way conflict with the cases laying down the general rule above set out, but, as said in *Kansas City, etc., Co.* v. *Botkin*, 240 U. S. 227, 234, 60 L. Ed. 617, 620, every case involving the validity of a tax must be decided upon its own facts and this court, looking through forms and reaching the substance of the thing, will ascertain whether the tax imposed in reality a tax upon the right to do interstate business.

This court has held in many cases, subsequent to the Western Union Telegraph Co., supra, that a permit tax placed upon foreign corporations, graduated according to the amount of paid up capital stock, is not necessarily a tax upon interstate commerce. The case at bar is clearly

to be differentiated from the cases cited by counsel for the plaintiff in error. When it is remembered that the plaintiff in error is a purely commercial corporation, carrying on in Virginia a purely local business; that it never came into the State in compliance with the laws of the State nor has acquired any permanent property here; that its interstate business of selling goods to be shipped in consequence of orders previously obtained is entirely separable from the construction work carried on in this State (it being remembered that in many instances, as we have heretofore shown, its products are sold without installing them); that the tax is a reasonable and not a prohibitive one only amounting to one thousand dollars; it is clearly seen that this case does not come within the rule laid down in the *Western Union Telegraph Co.* v. *Kansas, supra,* and other cases of like nature, but that it comes within the rule laid down in *Baltic Mining Co.* v. *Mass,* 231 U. S. 68, 58 L. Ed. 127.

In that case, this court, through Mr. Justice Day, reviews the authorities relied upon in brief for plaintiff in error. An annual excise tax, exacted from foreign corporations under a Massachusetts statute for the privilege of doing business in that State as applying to corporations which were incorporated to carry on a business not of itself interstate commerce, though their products were sold and shipped in such commerce, and who were carrying on a purely local and domestic business quite separable from their interstate transactions, was held not to be invalid under the commerce and due process of law clauses of the Constitution as necessarily amounting to a burden and tax upon the interstae business of such corporations, although the tax was imposed by taxing a percentage of the entire capital stock, where the facts that such authorized capital stock was but a part of the entire property and assets of

the corporation and that the maximum yearly tax was two thousand dollars compelled the conclusion that the authorized capital was used only as a measure of the tax, the court saying that:

> "The conclusion therefore that the authorized capital is only used as a measure of a tax, in itself lawful, without the necessary effect of burdening interstate commerce, brings the legislation within the authority of the State."

When it is remembered that the plaintiff in error is a purely commercial corporation and the construction work carried on in Virginia was purely local and separate from its interstate business, and that the tax itself is limited to a reasonable amount of one thousand dollars, it is manifest that the case at bar is controlled by the decision in *Baltic Mining Co.* v. *Mass.* It is unnecessary to continue this discussion as this court has repeatedly in the last few years distinguished between the line of cases relied by counsel for the plaintiff in error and the line of cases represented by the *Baltic Mining Co.* v. *Mass., supra; St. Louis Western Rwy. Co.* v. *Arkansas*, 235 U. S. 250, 59 L. Ed. 265; *Kansas City, etc., Rwy. Co.* v. *Botkin*, 240 U. S. 227, 60 L. Ed. 617, *Kansas City, etc., Rwy. Co.* v. *Stiles*, 242 U. S. 111, 61 L. Ed. 176. The facts in the case at bar clearly place it within this latter line of cases. The latest discussion of this matter is contained in the opinion of this court in the case of *Looney* v. *Crane Co.*, decided December 10, 1917, and not yet reported, in which Mr. Chief Justice White in delivering the opinion showed that there was no conflict between the line of cases relied on by counsel for the plaintiff in error and the line of cases represented by the *Baltic Mining Co.* v. *Mass., supra.*

We submit that the case at bar clearly comes within the ruling laid down in the case of *Baltic Mining Co.* v. *Mass.*, and that such tax, under the ruling in that case, is a valid exercise of the authority vested in the State of Virginia.

IV.

SINCE THE CONTRACT WAS FOR THE ORIGINAL CONSTRUCTION OF THE SIGNAL SYSTEM, THE PLAINTIFF IN ERROR WAS NOT ENGAGED IN INTERSTATE COMMERCE IN THE CONSTRUCTION THEREOF.

The fourth assignment of error is that since the construction of the railway signals for the Southern Railway, plaintiff in error was engaged in the erection and construction of an instrumentality for an interstate railroad, plaintiff in error was engaged in interstate commerce and protected by the commerce clause from being required to take out a license to do business in Virginia. But there is no case holding that one engaged in the *original construction* of an instrumentality which may thereafter be used in interstate commerce, is engaged in such commerce.

If the corporation in the case at bar was engaged in interstate commerce, when did that commerce begin? Did it begin as soon as the corporation began to work in its factory at Rochester upon the specifications furnished by the railroad, or when it began to dig holes for conduits? To ask this question shows the absurdity of the position taken by the plaintiff in error, and it needs no further argument to prove that, in the construction of this railway signal line, the plaintiff in error was not engaged in interstate

commerce so as to protect it from the necessity of taking out a license to do business within the State of Virginia.

To establish this proposition, the case of *Pederson* v. *Delaware L. & R. Co.*, 229 U. S. 146, 57 L. Ed. 1125, is cited. That was a case in which the plaintiff sued under the Federal Employers' Liability Act of 1908 to recover for personal injuries sustained through the negligence of a co-employee while both were in the defendant's service. The question involved, so far as pertinent here, was whether an employee of an interstate railway, while carrying a sack of bolts or rivets to be used in repairing a bridge which was regularly used in both interstate and intrastate commerce, was employed in interstate commerce within the meaning of the Employers' Liability Act, giving a right of recovery against the carrier for the death of an employee while so employed. In the majority opinion, delivered by Mr. Justice VanDevanter, it was held that the plaintiff was employed in interstate commerce within the meaning of the act, but in the course of the opinion the learned Justice said (p. 151):

> "Of course, we are not here concerned with the construction of tracks, bridges, engines or cars, *which have not as yet become instrumentalities in such commerce*, but only with the work of maintaining them in proper condition *after they have become such instrumentalities and during their use as such.*" (Italics ours).

Even if this were a case under the Employers' Liability Act, the above quotation from the decision would be sufficient to differentiate it from that case, for here we are concerned with the construction of a railway signal system

which has not as yet become an instrumentality of such commerce, and this is not a case of maintaining such a system after it has become such an instrumentality and during its use.

Since the case at bar was decided by the Supreme Court of Appeals of Virginia, this court has passed on this very question. In *Raymond* v. *Chicago, etc., Ry. Co.*, 243 U. S. 43, 61 L. Ed. 583 (1917) it was held by this court that an employee of an interstate railway who was engaged in the work of cutting a tunnel was not then employed in interstate commerce within the meaning of the Federal liability act *since the tunnel being only partially bored*, was not in use as an instrumentality of interstate commerce.

This case is a decisive answer to the fourth assignment of error.

But counsel for plaintiff in error tries to distinguish the principle laid down in this case from the case at bar on the ground that while a workman engaged in laying out a new road is not engaged in interstate commerce, in the case at bar, the construction of the signal system was on a road in actual operation. This is a distinction without a difference. Moreover the last case cited above answers this contention, for the employee injured in that case was working for a railroad in actual operation and the work was upon a tunnel to shorten the main line.

For these reasons and those given by the Supreme Court of Appeals of Virginia in its opinion in this case (R., pp. 47-53), we respectfully submit that the judgment of that court should be affirmed.

Respectfully submitted.

J. D. HANK, JR.,
Attorney General of Virginia.

January 18, 1918.

GENERAL RAILWAY SIGNAL COMPANY *v.* COMMONWEALTH OF VIRGINIA AT THE RELATION OF THE STATE CORPORATION COMMISSION.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 177. Argued March 11, 1918.—Decided April 15, 1918.

A foreign corporation, for lump sums, made and performed contracts to furnish completed automatic railway signal systems in Virginia, in the performance of which the materials, supplies, machinery, devices and equipment were brought from without, but their installation, as structures permanently attached to the soil, required employment of local labor, digging of ditches, construction of concrete foundations, and painting. *Held*, that local business was involved, separate and distinct from interstate commerce, and subject to the licensing power of the State. *Browning* v. *Waycross*, 233 U. S. 16.

The Virginia law imposing a fee for the privilege of doing local business of $1,000 on foreign corporations with capital over $1,000,000 and not exceeding $10,000,000 (Acts 1910, c. 53, § 38a), *upheld*, as not arbitrary or unreasonable under all the circumstances, though the case is on the border line.

118 Virginia, 301, affirmed.

500. Argument for Plaintiff in Error.

THE case is stated in the opinion.

Mr. Hugh Satterlee, with whom *Mr. Hiram R. Wood* was on the brief, for plaintiff in error:

Just what did the defendant do in Virginia? It employed there about 20 men—11 signal engineers and experienced men and 9 laborers—for possibly four or five months altogether. They erected iron signal masts about two miles apart and fitted on them alternating current induction motors, signal arms, gears, relays and housings, transformers, line arresters, etc. To reach the rails they dug short, shallow trenches, to an aggregate amount of not over 1,600 feet in a hundred miles. The Southern Railway Company furnished and put up the necessary wooden poles and wires. The defendant's men applied the last coat of paint to the signal apparatus, the first coats having been applied at the factory.

The defendant did these things in Virginia only because it could not do them in New York, and it had no desire or intention to establish its business in Virginia. Because of the nature of the defendant's products it was a complicated, tedious job to install them ready for use, but the defendant was in Virginia for that purpose and no other. It was merely completing a sale to the Southern Railway Company, and it did no business and had no relations with the citizens of Virginia except for hiring a few laborers.

In short, the defendant was doing in the State isolated acts incidental to its manufacturing and selling business conducted in New York. These acts completed, it might or might not ever again have so much as one employee in the State. To force such a casual, occasional entrant to secure a license to do business, continuously to maintain an office, to pay a license tax of $1,000 and an annual registration tax, would be, we respectfully submit, the height of injustice. The very language of the statutes

regulating foreign corporations doing business in the State is manifestly ill chosen to achieve such a result.

This court early decided that single transactions in a State by a foreign corporation, even in the conduct of its ordinary business, did not constitute "doing business." *Cooper Mfg. Co.* v. *Ferguson*, 113 U. S. 727.

Of course, the whole subject of "doing business" is interwoven with the effect of the commerce clause of the Constitution and many decisions assign one ground or the other apparently without much discrimination. More accurately speaking, however, if a foreign corporation is not doing business, there is no need to discuss the commerce clause, while if it is doing business, it may still be relieved from compliance with state statutes if its business be interstate.

A collateral line of cases throws an illuminating sidelight upon this difference. It is held that a foreign corporation is not subject to process in a State unless it is doing business there, but that a corporation may be doing business in a State for the purpose of suit against it, if continuously in the State, while not subject to state foreign corporation laws because engaged in interstate commerce. *International Harvester Co.* v. *Kentucky*, 234 U. S. 579.

To the same effect are *St. Louis Southwestern Ry. Co.* v. *Alexander*, 227 U. S. 218; *Washington-Virginia Ry. Co.* v. *Real Estate Trust Co.*, 238 U. S. 185; *Tauza* v. *Susquehanna Coal Co.*, 220 N. Y. 259. But when the corporation is not doing business in the State, service there on its officers is invalid. *Riverside Cotton Mills* v. *Menefee*, 237 U. S. 189; *Philadelphia & Reading Ry. Co.* v. *McKibbin*, 243 U. S. 264.

It should not be difficult to perceive the very substantial difference between the position of the Harvester Company, in the above decision, which was continuously in the State by its many agents, engaged in a permanent course of business, and was accordingly held to be doing

business there, although immune from state regulation because its business was interstate, and the position of the General Railway Signal Company, which entered Virginia temporarily for the sole purpose of completing definite sales already made to one customer, and was not doing business there, aside from any application of the commerce clause.

Inability readily to start an action against a foreign corporation is no justification for requiring the registration of such a corporation, unless it be actually doing business in the State and business that is not interstate commerce.

A fortiori, if a corporation is not doing business in a State for the purpose of service of process upon it, it is not doing business for the purpose of the statutes regulating foreign corporations.

In determining whether or not a foreign corporation is doing business in a State, we respectfully but earnestly submit, there are two fundamental questions.

First, is the corporation in the State temporarily or permanently? It is there temporarily if it is making one or more occasional sales, if it is doing one or more definite pieces of work for specified persons. It is there permanently if it maintains an office or a resident force of salesmen in the State. If it is there only temporarily, a further question must be put:

Second, what is the business of the corporation? If the corporation manufactures and sells machinery, for example, at a plant outside the State and enters the State only to make deliveries or to install or erect machinery which from its nature could not be shipped ready for operation, then the corporation is not doing business, *its* business, in the State. If, however, the business of the corporation is contracting or constructing, employing materials which it buys indiscriminately wherever it can, then, wherever it moves its construction plant, it is doing

business, *its* business. The actual *work* in the State that is done by both corporations may be exactly the same, but one may be doing business in the State and the other not. This obvious point, clear from many cases, the courts below missed altogether. See *Buffalo Refrigerating Mach. Co.* v. *Penn Heat & Power Co.*, 178 Fed. Rep. 696.

For several reasons, only one of which needs immediate mention, *Browning* v. *Waycross*, 233 U. S. 16, is no authority for the complainant, and, on the contrary, provides an illustration of our position. The defendant, an individual agent, was convicted under a local ordinance for carrying on the business of erecting lightning rods without a license. As a matter of fact, he *had* carried on the business,—he admitted it,—and no doubt his employer, the foreign corporation, was doing business in Georgia. By every criterion we have advanced that would be so. The foreign corporation was by fair inference permanently and continuously in the State (see our first question above). Whether or not, though doing business, it was subject to a state license tax, is another question. But the present defendant, unlike the defendant or his employer in *Browning* v. *Waycross*, has not been carrying on a continuous course of business in Virginia. *Cf. Williams, Inc.*, v. *Golden & Crick*, 247 Pa. St. 397, and *Delaware River Constr. Co.* v. *Bethlehem & Nazareth Ry. Co.*, 204 Pa. St. 22.

Even if the plaintiff in error were held to be doing business in the State of Virginia, its business was interstate commerce and was protected by the Federal Constitution against state burdens. *International Textbook Co.* v. *Tone*, 220 N. Y. 313; *Gibbons* v. *Ogden*, 9 Wheat. 1; *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; *Stockard* v. *Morgan*, 185 U. S. 27. As it is proper to procure orders in the State, so it is necessary to deliver there the goods ordered. They need not be shipped directly to the purchaser, but may be delivered in any rea-

sonably convenient way. *Caldwell* v. *North Carolina*, 187 U. S. 622; *Rearick* v. *Pennsylvania*, 203 U. S. 507; *Western Oil Refg. Co.* v. *Lipscomb*, 244 U. S. 346. The retention of title and possession until payment upon delivery in the State does not rob the transaction of its character as interstate commerce. *Norfolk & Western Ry. Co.* v. *Sims*, 191 U. S. 441. Even the exercise in a State of an option to purchase, given in connection with an interstate sale, is protected by the commerce clause if as a practical matter the business is one affair. *Davis* v. *Virginia*, 236 U. S. 697. The right to enforce payment for interstate sales is so essential to interstate commerce as to be protected by the commerce clause. *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197. If interstate sales are made from goods kept in a warehouse in the State for shipment from time to time out of the State, no license can be imposed on the seller. *Heyman* v. *Hays*, 236 U. S. 178.

The installation of its signals in Virginia by the plaintiff in error was just as necessary to its interstate commerce as any of the acts within the State involved in the foregoing decisions.

Realizing the difficulty of applying rules to so complex a subject, we yet believe that the solution of the problem can usually be made easy by ascertaining the answers to two further questions, which partly overlap our former.

First, is the essence of the transaction, taken as a whole, the interstate sale or the work done in the State? In other words, which is only accessory to the other? The essence of the transaction is the sale if the corporation manufactures or deals in goods for which it is seeking an outlet. The essence of it is the work done if the corporation is a contractor, having little or nothing to sell but its services.

Second, is the work done in the State reasonably incidental or necessary to the consummation of the interstate sale? Fortunately in our case the answer is clear.

The evidence shows that the signals sold the railway were complex and intricate and required installation by specially trained experts; that they could not be put together before shipment; that the manufacturer's trained employees were best fitted to install them; that the Southern Railway Company had no signal organization competent to install the signals; and that the installation by the manufacturer was necessary to effect the sale. It is immaterial, therefore, if the General Railway Signal Company had in Virginia twenty employees (as they had), or a hundred,—off and on for a few months (as they did), or continuously for years,—if the plaintiff in error was primarily engaged in selling its signals, and its employees, wherever hired or residing, were engaged in completing such sales.

If, although the contractor furnishes them from outside the State, the materials are readily purchasable in the market and it is only their assembly in a certain manner within the State that alters them from general usefulness and adaptability into the specific structure desired, then it is likely that the work in the State is the essence of the transaction. But if the contractor at its plant outside the State manufactures more or less ordinary materials into definite apparatus, which already has a unique character before its shipment into the State, then the necessary assembly in the State of that apparatus into the completed whole for which it was solely adapted before shipment cannot outweigh the interstate commerce. *Browning* v. *Waycross*, fairly read, is at best no authority for the complainant and actually supports the test questions which we have above suggested.

The imposition of a tax upon the entire capital stock of the plaintiff in error as a condition of its doing intrastate business in connection with its interstate business is repugnant to the Federal Constitution.

The inability of the defendant to perform the work of

installation in Virginia would have prevented or at least seriously embarrassed its confessedly interstate sale to the Southern Railway Company. Permission by Virginia, therefore, only upon a burdensome condition to put together the signals in Virginia would have a very direct effect upon the interstate commerce in which the defendant was engaged.

Assuming that the defendant was engaged in intrastate business in its installation work, yet the State could not impose as a condition of its doing such business, closely and inseparably connected as it was with its interstate business, which admittedly the State could not prevent, a tax upon the defendant's entire capital stock. As above indicated, a tax measured by the proportion of the defendant's capital stock represented by property owned and used in the State would have been proper, which confirms the validity of the defendant's contention that it was not doing business in Virginia, for the proportion of the defendant's capital stock represented by property owned and used in the State is now and always has been zero.

In the installation alone of its signals upon the Southern Railway the plaintiff in error was engaged in interstate commerce. Whoever was engaged in installing the signals in the present case, partly to replace old signals, was engaged in maintaining and improving an instrumentality of interstate commerce, and was consequently engaged in interstate commerce. If the employees were engaged in interstate commerce, naturally the employer was likewise. *Pedersen* v. *Delaware, Lackawanna & Western R. R. Co.*, 229 U. S. 146, and other cases.

It is true, as indicated in the *Pedersen Case*, that a workman engaged in the laying out of a new railroad or the construction of a bridge in connection therewith is not engaged in interstate commerce. The commerce does not begin until the breath of life is infused into the com-

pleted work, until operation is begun. But the Southern Railway was a road in actual operation. The installation of the signals was a work of maintenance, done in pursuance of the duty of the carrier to correct any insufficiency in its appliances or other equipment. The signal workers were altering and repairing, as in the *Pedersen Case*, a living, pulsating instrumentality of interstate commerce. See *Eng* v. *Southern Pacific Co.*, 210 Fed. Rep. 92; *Chrosciel* v. *New York Cent. & H. R. R. R. Co.*, 174 App. Div. 175.

Whoever does it, the work of installing signals through different States on interstate lines is indissolubly connected with interstate commerce. To hold otherwise would be to permit any State capriciously to prevent the installation of a uniform system of signals along interstate railways, beyond question a matter of national concern.

The Urgent Deficiency Act of October 22, 1913, contained an appropriation to enable the Interstate Commerce Commission "to investigate and report in regard to the use and necessity for block signal systems," and the Commission has repeatedly urged enactment by Congress of a law compelling their adoption. *Cf. Haskell* v. *Cowham*, 187 Fed. Rep. 403, and *California* v. *Central Pacific R. R. Co.*, 127 U. S. 1.

Mr. J. D. Hank, Jr., Attorney General of the State of Virginia, for defendant in error.

Mr. Justice McReynolds delivered the opinion of the court.

Plaintiff in error seeks reversal of a judgment of the Supreme Court of Appeals of Virginia which affirmed an order of the Corporation Commission imposing a fine upon it for doing business within the State without first obtaining proper authority.

The essential facts concerning business done as found by the Commission and approved by Supreme Court are these:

"The defendant is a corporation of the State of New York, having an authorized capital of $5,000,000. Its principal office and factory is at Rochester, N. Y., where it owns and operates a large manufacturing plant devoted to the manufacture of materials chiefly used in the construction of railway signals which it sells and constructs all over the world. It has a branch factory at Montreal, Canada, and maintains branch offices in New York City, Chicago, and San Francisco.

"By contract dated the fifth day of May, 1914, with the Southern Railway Company, the defendant agreed to furnish certain materials, supplies, machinery, devices and equipment, as well as all necessary labor, and to install, erect, and put in place certain signals and apparatus shown on the plans and described in the specifications, from Amherst to Whittles, Virginia, fifty-eight miles, and to 'complete the entire system and turn same over to the railway company as a finished job,' subject to inspection and acceptance, for $85,597. Similar contracts had been previously made and fully performed, one dated September 6, 1911, covering the lines of the Southern Railway in Virginia from Monroe to Montview, Virginia, thirteen miles, for $16,015, and one dated July 18, 1913, from Orange to Seminary, Virginia, seventy-six miles, for $112,428. The aggregate distance in this State covered by these contracts being 147 miles, and the total consideration being $214,040.

"The purpose of these signals is to promote safety of railway operation and they operate automatically.

"In order to construct these signals as required by the contract it was necessary to employ in this State labor, skilled and unskilled, to dig ditches in which conduits for the wires are placed, to construct concrete foundations,

and to paint the completed structures. The completed structures are along the side of the railway track, about two miles apart, and are twenty-two or twenty-three feet high. In the language of the witness, Moffett: 'It is necessary to erect the signal mechanism, the masts supporting the mechanism, the houses for protecting the relays, reactors, reactants and other similar electrical devices protected from the weather, then the transformers, high tension line arrestors and low tension line arrestors.' The completed structures are permanently attached to the freehold upon concrete bases."

We think the recited facts clearly show local business separate and distinct from interstate commerce within the doctrine announced and applied in *Browning* v. *Waycross*, 233 U. S. 16.

It is further insisted that as the amount of prescribed entrance fee is based upon maximum capital stock it constitutes a burden on interstate commerce, contrary to the Federal Constitution.

Section 38a, c. 53, Acts of Virginia, 1910 (copied in margin) [1] requires every foreign corporation with capital

[1] "Sec. 38a. Every foreign corporation, when it obtains from the State corporation commission a certificate of authority to do business in this State, shall pay an entrance fee into the treasury of Virginia, to be ascertained and fixed as follows:

"For a company whose maximum capital stock is fifty thousand dollars or less, thirty dollars; for a company whose capital stock is over fifty thousand dollars, and not to exceed one million dollars, sixty cents for each one thousand dollars or fraction thereof; over one million dollars, and not to exceed ten million dollars, one thousand dollars; over ten million dollars, and not to exceed twenty million dollars, one thousand two hundred and fifty dollars; over twenty million dollars, and not to exceed thirty million dollars, one thousand five hundred dollars; over thirty million dollars, and not to exceed forty million dollars, one thousand seven hundred and fifty dollars; over forty million dollars, and not to exceed fifty million dollars, two thousand dollars; over fifty million dollars, and not to exceed sixty million dollars, two thousand two hundred and fifty dollars; over

over one million and not exceeding ten million dollars when it obtains a certificate of authority to do local business to pay a fee of one thousand dollars. Inspection of the statute shows that prescribed fees do not vary in direct proportion to capital stock and that a maximum is fixed. In the class to which plaintiff in error belongs the amount specified is one thousand dollars and, under all the circumstances, we cannot say this is wholly arbitrary or unreasonable.

Considering what we said in *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68; *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350; *Kansas City, Fort Scott & Memphis Ry. Co.* v. *Kansas*, 240 U. S. 227; *Kansas City, Memphis & Birmingham R. R. Co.* v. *Stiles*, 242 U. S. 111, the two characteristics of the statute just referred to must be regarded as sufficient to save its validity. It seems proper, however, to add that the case is on the border line. See *Looney* v. *Crane Co.*, 245 U. S. 178; *International Paper Co.* v. *Massachusetts*, *ante*, 135, and *Locomobile Co.* v. *Massachusetts*, *ante*, 146.

The judgment of the court below is

Affirmed.

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sixty million dollars, and not to exceed seventy million dollars, two thousand five hundred dollars; over seventy million dollars, and not to exceed eighty million dollars, two thousand seven hundred and fifty dollars; over eighty million dollars, and not to exceed ninety million dollars, three thousand dollars; over ninety million dollars, five thousand dollars; provided, however, that foreign corporations without capital stock shall pay fifty dollars only for such certificate of authority to do business in this State.

"For the purpose of this act the amount to which the company is authorized by the terms of its charter to increase its capital stock shall be considered its maximum capital stock."